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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

FARMERS AND MERCHANTS' BANK,  
PHOENIX, as Intervener,  
Appellant,  
vs.

ARIZONA MUTUAL SAVINGS AND LOAN  
ASSOCIATION and ARIZONA TRUST  
COMPANY and SIMS ELY, as Receiver for  
the ARIZONA MUTUAL SAVINGS AND  
LOAN ASSOCIATION and ARIZONA  
TRUST COMPANY, and the Intervening  
Petitioners Who were Allowed to Intervene  
in the Cause Entitled CHARLES W.  
CLARK, Complainant, vs. ARIZONA MU-  
TUAL SAVINGS AND LOAN ASSOCIA-  
TION and ARIZONA TRUST COMPANY,  
Defendants, in the Court Below, by the Decree  
of March 12, 1914,  
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court  
for the District of Arizona.

Filed

JUL - 1 1914





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Circuit Court of Appeals  
For the Ninth Circuit.

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FARMERS AND MERCHANTS' BANK,  
PHOENIX, as Intervener,  
Appellant,  
vs.

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Upon Appeal from the United States District Court  
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James Co.

876

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States for the  
District of Arizona.*

CHARLES W. CLARK,  
Complainant,  
vs.

ARIZONA MUTUAL SAVINGS AND LOAN  
ASSOCIATION and ARIZONA TRUST  
COMPANY,  
Defendants.

**Final Decree [Feb. 27, 1913.]**

THIS CAUSE came on to be heard at this term of the court, and, after hearing the witnesses and receiving the evidence offered in support of the claims of the interveners herein and after hearing counsel for the interveners and counsel for the defendants as to the final decree to be entered herein, and upon a full consideration thereof, it was ordered, adjudged and decreed, as follows:

FIRST: That the persons hereinafter named in this paragraph are interveners in the above-entitled cause who are still stockholders in the defendant Arizona Mutual Savings and Loan Association, and, as such, have paid in to said defendant Arizona Mutual Savings and Loan Association the following sums set opposite the names of each:

John Dennett, Jr.....	\$352.00
J. G. Bogard.....	180.00
J. J. Keating.....	36.00
Rose Boehmer .....	360.00
Mary Bleak .....	72.00
Harry E. Harter.....	168.00



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H. S. Gray..... 570.00

Mary E. Ellsworth..... 891.78

[1\*]

L. M. Gustafson.....\$500.00

A. H. Ferrin..... 288.00

Lucy H. Purdum..... 144.00

H. P. Wightman..... 450.00

A. C. Lockwood..... 472.00

Alex Anderson.... 675.00

D. Bohn..... 600.00

Erit Equist..... 450.00

A. H. Oeltjen..... 252.00

George S. Hughes..... 288.00

Mrs. W. J. Jackson..... 114.00

Lysander Cassidy..... 307.00

Ramon Brenna.... 180.00

SECOND: That the persons hereinafter named in this paragraph are interveners herein who were formerly stockholders in the defendant Arizona Mutual Savings and Loan Association, but who have exchanged their stock in the defendant Loan Association for stock in the defendant Arizona Trust Company, and that said persons are hereinafter referred to as "exchanging stockholders" in the defendant Loan Association, and that each of the persons named in this paragraph have heretofore paid in to the defendant Loan Association or to the defendant Trust Company the following sums set opposite the names of each:

Ross H. Blakely.....\$ 72.00

John W. Harris, Jr..... 126.00

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\*Page-number appearing at foot of page of original certified Record.

A. E. Morcom.....	450.00
Fred W. Albright.....	60.00
M. Kirshwing.....	474.40
Olaf Olsen.....	266.44
Theo. Holten and Ole Holten....	256.43
Hugo Sandquist.....	1049.33

[2]

Eugene Seeley.....	\$ 558.21
James H. East.....	351.21
Fred Cadwell.....	352.67
Margaret Cadwell.....	1211.98
E. B. Tinker.....	312.00
E. L. Hosler.....	390.00
S. L. Hosler.....	264.00
Glenn W. Morse.....	324.00
N. G. Tang Fong.....	192.00
A. E. Gillard.....	504.00
J. C. Wilhelm.....	210.00
Frank A. Moss.....	252.00
Geo. K. Anderson.....	504.00
L. D. LaChance.....	180.00
Grace Langston.....	600.00
Frank A. Flickeringer....	280.00
Charles J. Patterson.....	270.00
E. T. Staebler.....	458.00
Nettie Sheldon.....	282.00
Lloyd C. Henning.....	210.00
Wilson Patterson.....	264.00
E. W. Clayton.....	864.00
William C. Faulkner.....	1000.00
Walter W. Williams.....	402.00
J. N. Stratton.....	204.00

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W. E. Platt.....	204.00
John F. Weber.....	192.00
S. G. Ijams.....	300.00
Ida N. Frye.....	600.00
William Sobey.....	318.00
William Whalley.....	318.00
O. W. Miller.....	354.00

[3]

William H. Watts.....	\$1680.00
Globe Lumber Company.....	899.10
Alfred Hansen.....	552.00
Clara F. Bloom, nee Clara Ferrin..	318.00
Orville Young.....	204.00
Fred W. Horn.....	285.00
J. C. Bradley.....	300.00
Oliver Myers.....	180.00
J. W. McLean.....	600.00
Joseph Carpenter.....	216.00
John Steigler.....	696.00
C. R. Freeman.....	312.00
M. A. Ramirez.....	216.00
E. J. Brunenkant.....	111.00
C. Brunenkant.....	90.00
Thomas Weedon.....	132.00
Frederick E. White.....	288.00
Frederick E. White, assignee of Ah Lee.....	225.00
Sam Y. Barkley.....	150.00
M. D. Langley.....	660.00
Mrs. J. N. Russell.....	374.38
Cora E. Dunagan.....	450.00
Helen Weber.....	236.00



W. E. Young.....	252.00
Mrs. M. L. Graves.....	297.36
Mrs. W. S. Hurst.....	297.53
Mrs. C. S. Brown.....	318.45
Maria B. Stevens.....	290.04
A. T. Kleinschmidt.....	233.40
Rosario C. Brena.....	114.00
A. J. Durago.....	312.00

[4]

H. Capin.....	\$ 75.00
L. C. Frederico.....	156.00
E. T. Collins.....	96.00

THIRD: That heretofore and in or about the month of March, 1911, the defendant Arizona Trust Company was, by those in control of the defendant Arizona Mutual Savings and Loan Association, caused to be organized; and that at or about said time the defendant Loan Association was insolvent and unable to meet its obligations to its stockholders as said obligations were accruing, and that the purpose of the organization of the defendant Trust Company was to take over the assets and properties of the said defendant Loan Association, and to engage in the business of conducting and maintaining the said defendant Trust Company.

FOURTH: That as to the interveners herein and other non-consenting stockholders in the defendant Loan Association, who had never transferred their stock therein for stock in the defendant Trust Company, the said proposed transfer of the assets and properties of the defendant Loan Association to the defendant Trust Company was unlawful and invalid

and not binding upon the interveners herein or upon the other outstanding and non-exchanging stockholders in the defendant Loan Association.

FIFTH: That pursuant to such purpose, all of the assets and properties of the defendant Loan Association were subsequently transferred to the defendant Trust Company, since which time the defendant Trust Company and its officers have dealt with the said assets and properties as though owned by the defendant Trust Company and have confused and inseparably mingled the assets derived from the defendant Loan Association with the assets of the defendant Trust Company, and that at this time it is impracticable and impossible in justice to the parties hereto to [5] direct and enforce a re-transfer of all of the original properties and assets so derived by the defendant Trust Company, and the profits thereon, from the defendant Loan Association to said last named Company or the receiver of said Company.

SIXTH: That all of the interveners above named, described herein as "exchanging stockholders" in the defendant Loan Association, were induced to exchange their said stock in the defendant Loan Association for stock in the said defendant Trust Company in reliance upon representations theretofore made to them in the printed literature of one or both defendants and by verbal statements made to them by the representative of the defendants, and that such representations were in fact false and were known by the defendants to be false when made, and induced the said interveners to make the exchange

of their said stock as aforesaid; in consequence whereof, the Court decrees that the said interveners named herein as exchanging stockholders in the defendant Loan Association be, and each of them hereby is, allowed and permitted to rescind the said exchange of their stock; and it is hereby ordered and decreed that each of said "exchanging stockholders" be, and they hereby are, restored to their original position and status as stockholders of the defendant Loan Association, and each of said "exchanging stockholders" is hereby deprived of his status of a stockholder in the defendant Trust Company.

SEVENTH: And to the end that the rights of all of the interveners herein and of the outstanding stockholders in the defendant Loan Association who never exchanged their stock therein for stock in the defendant Trust Company may be adequately preserved and protected, the Court hereby confirms the sale and transfer of all of the assets of the defendant Loan Association to the defendant Trust [6] Company, and adjudges that complete title is vested in the defendant Trust Company of, in and to all of the assets and properties of whatsoever kind or nature heretofore owned by the defendant Loan Association, subject only to the lien and charges hereinafter specified.

EIGHTH: And for the further protection of the rights of the said interveners and the said stockholders in the defendant Loan Association who never exchanged their stock therein for stock in the defendant Trust Company, the Court adjudges and determines that all of the assets and properties now



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or hereafter owned or acquired by the defendant Trust Company be, and they hereby are, impressed with the trust and lien in favor of each of the said interveners named herein to the extent and amount set opposite the names of each, and in favor of the stockholders in the defendant Loan Association who never exchanged their stock therein for stock in the Trust Company for the amounts heretofore paid in by such last named persons in the following names and amounts:

S. Arneson .....	\$3349.10
Mrs. H. C. Bagge.....	321.96
A. M. Baker.....	238.00
A. Barrasa .....	82.00
Ed. Barry .....	140.00
H. L. Bedford.....	185.00
L. Bejarano .....	100.00
A. C. Bittick.....	114.00
R. R. Brenz.....	523.48
D. A. Burke .....	360.00
A. E. Carillo.....	314.86
D. H. Butris.....	165.00
W. H. Caruthers.....	300.00
R. F. Chamberlain.....	78.00
[7]	
D. P. Clanton.....	100.00
T. N. Clanton.....	112.00
J. S. Clark.....	174.00
S. B. Lucas.....	902.00
E. J. Doyle.....	96.00
A. J. Durazo.....	242.00
Mrs. L. C. Earle.....	84.00

Miss V. Espionzoa.....	168.00
A. H. Ferrier.....	296.00
C. Hagerland .....	911.65
J. R. Hampton.....	77.00
Wade Hampton .....	541.06
C. F. Holdsworth.....	637.80
D. P. Jones.....	98.00
H. A. Kendall.....	71.00
A. Maurino .....	950.00
C. Monroe .....	112.00
E. Morales .....	109.00
Mrs. L. R. Morris.....	297.90
F. E. Murphey.....	327.72
Jennie McCarthy .....	570.00
W. W. McNeff.....	130.00
Ida Patterson .....	79.43
J. S. Patten.....	956.70
C. Purtyman .....	108.96
C. Purtyman .....	175.70
G. R. Robinette.....	156.00
A. D. Rosecrans.....	192.00
A. D. Rosecrans.....	551.86
T. A. Sanders.....	350.00
Short and Ward.....	112.00
Short and Ward .....	93.00
[8]	
J. C. Simmons .....	234.84
A. K. Snider.....	114.00
B. D. Snider.....	114.00
M. M. Stacy.....	114.00
R. W. Sturgis.....	516.64
J. H. Thompson.....	1019.43

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J. Barragan .....	101.00
J. Wagner .....	124.59
Mrs. E. Widner.....	405.16
A. Millett .....	989.00
M. Potter .....	1098.65
A. H. Hammer.....	370.00
Wade Hampton .....	406.73

[9]

NINTH: And to effectuate this decree and to enable it expeditiously and economically to be carried into full force and effect, the Court directs George D. Christy, Esq., as the temporary receiver of the defendant Loan Association, heretofore duly appointed, to account to the Court and to surrender and deliver to the permanent receiver of the defendant Trust Company, hereinafter named, all of the assets and property of whatsoever kind or nature which have heretofore come into his hands as such receiver; and it is adjudged and decreed that the accounts of said receiver presented simultaneously herewith are passed and adjudged to be in all things correct, and the bond of the said receiver is hereby cancelled and the sureties thereon exonerated from further liability thereon; and the Court discharges the said George D. Christy, Esq., as receiver of the defendant Loan Association and from all further responsibility and liability arising out of said receivership; and it appearing to the Court's satisfaction that the said George D. Christy, Esq., as receiver, has fully and faithfully discharged the duties of his trust, and in connection therewith it has been necessary for the said receiver to retain

counsel, and that, by reason of such necessity, said receiver has retained Messrs. Chalmers and Kent as his counsel, which counsel have rendered substantial and valuable services to the said receiver in the conservation and preservation of the estate of which the said George D. Christy, Esq., was receiver; and it appearing to the Court's satisfaction that counsel for the interveners herein has rendered substantial services of value to all of the interveners and to all of the stockholders of the defendant Loan Association, named in the preceding paragraph, and that said services have resulted in the production of a fund in Court consisting of the assets of the said defendant Loan Association and of the assets of the said defendant Trust Company for the benefit of the said interveners named herein and for the benefit of the stockholders of the defendant Loan Association, named in the [10] preceding paragraph, and the cause being one of extraordinary and *exception* difficulty and the Court being fully advised by proof of the value of the services rendered: Now, therefore, in accordance with the usual practice of the Court in such cases, the Court fixes the allowances of the said George D. Christy, Esq., as receiver, and of his counsel, and of the counsel for the interveners herein, as follows:

To George D. Christy, Esq., for services rendered as aforesaid, Twelve Hundred and Fifty Dollars (\$1250.00);

To Messrs. Chalmers and Kent, for services rendered as counsel for said receiver, Twelve Hundred and Fifty Dollars (\$1250.00);



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To the interveners above named upon account of the services rendered to them in this proceeding by their counsel, William M. Seabury, Three Thousand Three Hundred Seventy-six and 06/100 Dollars (\$3376.06).

And the Court further directs the permanent receiver, hereinafter named, to pay the items appearing upon the account of George D. Christy, Esq., as receiver of the defendant Loan Association, which are unpaid and which are hereby allowed.

TENTH: And the Court hereby appoints Sims Ely, Esq., as permanent receiver of the defendant Arizona Mutual Savings and Loan Association and of the defendant Arizona Trust Company; and the said Sims Ely, Esq., having duly presented his accounts as temporary receiver of the defendant Trust Company, the said accounts are hereby passed and allowed; and the fees of the said Sims Ely, Esq., as temporary receiver, are hereby fixed in the sum of Seven Hundred and Fifty Dollars (\$750.00); and it appearing to the Court's satisfaction that the said receiver has necessarily employed Clyde M. Gandy, Esq., as Counsel, and that he has rendered substantial [11] services to the said temporary receiver in aid of said receiver, the compensation of the said Clyde M. Gandy, Esq., for services rendered to the said Sims Ely, Esq., as temporary receiver, is hereby fixed in the sum of Seven Hundred and Fifty Dollars (\$750.00); and full power and authority is hereby conferred upon the said Sims Ely, Esq., as permanent receiver, to do and perform all such acts as may be necessary and proper to be done by a per-

manent receiver, in accordance with the usual practice of this Court in such and similar cases; and the said receiver is hereby directed to sell at public or private sale and upon such terms as to the said receiver may seem proper, but subject to the future ratification and confirmation of the Court, so much or the whole of the assets and properties of the defendant Trust Company as may be necessary first to pay and discharge the allowances heretofore made as the costs of administration of the insolvent estate of the said defendant Loan Association, and thereafter to discharge and pay the costs and expenses incident to the administration of the estate of the said defendant Trust Company, including the allowance hereafter to be made to the said Sims Ely, Esq., as permanent receiver and to his counsel in the premises, and that thereafter he pay *pro rata* in equal shares to each and all of the interveners herein and to the stockholders of the defendant Loan Association, named in the preceding eighth paragraph, such sums of money as may be received by such permanent receiver until the said interveners and the said non-exchanging Loan Association stockholders, named in the preceding eighth paragraph, are paid in full the amounts set opposite their respective names herein; and that the said receiver pay the balance remaining thereafter, if any, in his hands to the defendant Trust Company for the benefit of such persons as may be lawfully entitled thereto.

ELEVENTH: And the Court hereby vests the said Sims Ely, Esq., as permanent receiver, with all the rights, title, benefits and privileges heretofore

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existing in the defendant Arizona Mutual Savings and Loan Association and in the said George D. Christy, Esq., [12] as temporary receiver thereof, with full power to said permanent receiver (to be substituted in his capacity as permanent receiver) of the defendant Arizona Mutual Savings and Loan Association or as permanent receiver of the defendant Arizona Trust Company, or both, in any and all litigation in which the defendant Loan Association, or the said George D. Christy, Esq., as temporary receiver thereof, or in which the defendant Trust Company, or the said Sims Ely, Esq., as temporary receiver thereof, may be a party, or in which the said defendant Loan Association, or said George D. Christy, Esq., as temporary receiver may have an interest; and full power and authority is hereby given to said Sims Ely, Esq., as permanent receiver, to employ and compensate, as in his judgment may seem proper, such counsel or other assistants and employees as in the judgment of the said Sims Ely, Esq., as permanent receiver, may be for the benefit of the estate of which the said Sims Ely, Esq., is hereby appointed permanent receiver.

TWELFTH: And any and all persons having any property or assets of either defendant are hereby directed to deliver forthwith to the said Sims Ely, Esq., as permanent receiver of the defendants above named, all such property or assets in which either or both defendants have or claim to have an interest; and the said defendants, and each of them, and all of the officers, directors, agents and representatives of the said defendants, and all persons claiming from,

through or under them, or either of them, are hereby enjoined and restrained from in any way disposing of any of the properties of the defendants above named, or either of them, and from interfering or in any way embarrassing the said receiver in the performance of his said duties.

DONE in open court, this 27th day of February, 1913.

(Signed) RICHARD E. SLOAN,  
United States District Judge. [13]

[Endorsements]: No. 53. District Court of the United States for the District of Arizona. Charles W. Clark, Complainant, vs. Arizona Mutual Savings and Loan Association, and Arizona Trust Company, Defendants. (Original.) Final Decree. Filed March 1, 1913, at 1:00 P. M., Allan B. Jaynes, Clerk. William M. Seabury, Solicitor for the Interveners, No. 306 Fleming Building, Phoenix, Arizona. [14]

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**[Order Allowing C. L. Nabers and E. E. Kirkland  
Payment for Services Rendered Receiver.]**

*In the United States District Court for the District  
of Arizona.*

MINUTE ENTRY MADE ON SATURDAY  
MARCH 1, 1913.

No. 53.

CHARLES W. CLARK,

Plaintiff,

vs.

THE ARIZONA MUTUAL SAVINGS & LOAN  
ASSOCIATION et al.,

Defendants.



IT IS ORDERED that C. L. Nabers be and hereby is allowed the sum of Two Hundred and Fifty Dollars for services to the receiver herein, and that E. E. Kirkland be and he is hereby allowed the sum of One Hundred Dollars for services rendered the receiver herein. [15]

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**[Order Directing Alice U. Solomon et al. to Show Cause, etc.]**

*In the United States District Court for the District of Arizona.*

MINUTE ENTRY MADE ON WEDNESDAY,  
MARCH 19, 1913.

No. 53.

CHARLES W. CLARK,

Plaintiff,

vs.

ARIZONA MUTUAL SAVINGS AND LOAN  
ASSOCIATION and ARIZONA TRUST  
COMPANY,

Defendants.

Upon the annexed petition of Sims Ely as permanent receiver of the defendants above named, duly verified March 19, 1913, and upon all of the proceedings heretofore had in the above-entitled cause, and in the cause now pending in this Court wherein George D. Christy, as temporary receiver of the defendant Mutual Savings and Loan Association, is plaintiff, and Alice U. Solomon, the National Bank of Arizona and the Arizona Trust Company are defendants, and upon the proceedings had in the cause

in the Superior Court of Maricopa County, wherein Alice U. Solomon was plaintiff and the defendant, Arizona Trust Company, was defendant;

IT IS HEREBY ORDERED that said Alice U. Solomon, the National Bank of Arizona and the defendant Arizona Trust Company, and each of them, or their respective attorneys, show cause, if any there be, before this Court upon the 24th day of March, 1913, or as soon thereafter as counsel may be heard, why an order should not be made in the above-entitled cause suspending the alleged lien created by the entry and docketing of the [16] judgment in the Superior Court of Maricopa County on January 27, 1913, in favor of the said Alice U. Solomon and against the said Arizona Trust Company, and why the said Sims Ely as permanent receiver of the defendants above named should not have the other relief prayed for in the petition hereto annexed; and why the said receiver should not have such other and further relief as to the Court may seem proper; and sufficient reason appearing therefor,

IT IS ORDERED that service of a copy of this order upon Messrs. Armstrong and Lewis, Solicitors in this court, as attorneys for the said National Bank of Arizona, and the said Alice U. Solomon, on or before March 20, 1913, shall be deemed sufficient notice hereof. [17]

**[Order Ratifying and Approving Contract Between  
Permanent Receiver and J. W. Walker, etc.]**

*In the United States District Court for the District  
of Arizona.*

MINUTE ENTRY MADE ON WEDNESDAY,  
MARCH 19, 1913.

No. 53.

CHARLES W. CLARK,

Complainant,

vs.

ARIZONA MUTUAL SAVINGS AND LOAN  
ASSOCIATION and the ARIZONA TRUST  
COMPANY,

Defendants.

The application of Sims Ely, as permanent receiver of the defendants above named, for an order ratifying and confirming the sale of all of the right, title and interest of the said receiver and of both of the defendants above named, of, in and to each and all of the premises described in that certain contract dated March 19, 1913, by and between the said receiver and J. W. Walker of Phoenix, Arizona, regularly coming on to be heard, and after hearing Clyde M. Gandy, Esq., as counsel for said receiver and William M. Seabury, Esq., as counsel for the interveners in the above-entitled cause, and the Court being fully advised in the premises, and due deliberation having been had:

Now, therefore, on motion of Clyde M. Gandy, Esq., attorney for said receiver, IT IS HEREBY

ORDERED, That the said contract between said permanent receiver and said J. W. Walker, described herein, be, and the same hereby is, in all respects ratified and approved.

AND IT IS FURTHER ORDERED that upon receipt of the sum of Five Thousand Dollars from the said purchaser, the [18] said receiver shall, and he is hereby ordered and directed, to make, execute, acknowledge and deliver, in accordance with the terms of the said contract, deeds, and conveyances and all other instruments necessary to convey to the said purchaser all of the rights, title and interest of the said Sims Ely as permanent receiver and of both of the defendants above named, of, in and to each and all of the properties mentioned and described in the said contract herein referred to. [19]

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**[Order Continuing Hearing of Order to Show Cause  
Until April 3, 1913.]**

*In the United States District Court for the District  
of Arizona.*

MINUTE ENTRY MADE ON MONDAY, MARCH  
24, 1913.

No. 53.

CHARLES W. CLARK,

Plaintiff,

vs.

ARIZONA MUTUAL SAVINGS & LOAN ASSO-  
CIATION and ARIZONA TRUST COM-  
PANY,

Defendants.



20 *Farmers and Merchants' Bank, Phoenix, vs.*

By consent of counsel for the respective parties hereto, IT IS ORDERED that the hearing of the order to show cause directed to Alice U. Solomon and the National Bank of Arizona be continued until Thursday, April 3, 1913, at 10:00 o'clock A. M.  
[20]

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**[Order Postponing Lien Until Terms and Conditions  
of Final Decree be Fully Performed and Satis-  
fied, etc.]**

*In the United States District Court for the District  
of Arizona.*

MINUTE ENTRY MADE ON THURSDAY,  
APRIL 3, 1913.

No. 53.

CHARLES W. CLARK,

Complainant,

vs.

ARIZONA MUTUAL SAVINGS AND LOAN  
ASSOCIATION and the ARIZONA TRUST  
COMPANY,

Defendants.

The motion of Sims Ely as permanent receiver of the defendants above named for an order suspending and postponing the lien of the judgment recovered by Alice U. Solomon against the defendant Arizona Trust Company in the Superior Court of Maricopa County, Arizona, on January 27th, 1913, regularly coming on to be heard, and upon hearing William M. Seabury, as counsel for the said receiver, and Ernest

W. Lewis, as counsel for the National Bank of Arizona and the said Alice U. Solomon, and due deliberation having been had, now, on motion of the said receiver, counsel for the said Alice U. Solomon not opposing, it is hereby

ORDERED, that the lien of the said judgment of the Superior Court of Maricopa County, Arizona, entered January 27th, 1913, in the cause then and there pending wherein Alice U. Solomon was plaintiff and the said Arizona Trust Company was defendant, be and the same is hereby postponed as against any and all of the assets and properties of the defendant Arizona Trust Company until the terms and conditions of the final decree entered in the above-entitled cause on February 27th, 1913, be fully performed and satisfied, and it is hereby [21]

ADJUDGED AND DECREED that any and all of the assets and properties of the said defendants above named, and each of them, which have been or which may hereafter be sold by said receiver under the terms of the said final decree of February 27th, 1913, shall be so sold free and clear of any lien, charge or incumbrance arising out of or by virtue of the said Solomon judgment, and that the lien thereof, if any, shall be and hereby is transferred and declared to attach to the surplus monies, if any, which may remain in the hands of the said receiver after a full compliance with and performance of the terms of the said final decree entered herein on February 27th, 1913. [22]

**[Order Setting Motion to Correct Clerical Error in  
Judgment for Hearing.]**

*In the United States District Court for the District  
of Arizona.*

MINUTE ENTRY MADE ON SATURDAY,  
APRIL 5, 1913.

No. 53.

CHARLES W. CLARK,

Complainant,

vs.

ARIZONA MUTUAL AND SAVINGS ASSOCIA-  
TION and the ARIZONA TRUST COM-  
PANY,

Defendants.

IT IS ORDERED that the motion of D. H. Burtis  
to correct a clerical error in the judgment herein be  
set for hearing on Monday, April 7, 1913, at 10:00  
o'clock A. M. [23]

**[Order Granting Motion for Correction of Clerical  
Error in Judgment, and Directing Correction of  
Judgment.]**

*In the District Court of the United States for the  
District of Arizona.*

MINUTE ENTRY MADE ON MONDAY, APRIL  
7th, 1913.

No. 53.

CHARLES W. CLARK,

Complainant,

vs.

ARIZONA MUTUAL SAVINGS AND LOAN AS-  
SOCIATION and ARIZONA TRUST COM-  
PANY,

Defendants.

This matter came on this day regularly to be heard upon the petition of D. M. Burtis to correct a clerical error in the judgment herein. Messrs. Armstrong and Lewis, Esquires, appearing as counsel for the petitioner, C. M. Gandy appearing as counsel for the defendants and William M. Seabury, Esquire, appearing as counsel for the interveners, whereupon the petitioner, in support of his motion, files an affidavit by the petitioner and the matter being fully submitted to the Court and the Court being fully advised in the premises, does grant said motion, and orders that the judgment herein be corrected accordingly. [24]



**[Order Denying Motion of John Dennett, Jr., to  
Strike Petition in Intervention of J. L. Warring  
et al. from the Files.]**

*In the United States District Court for the District  
of Arizona.*

MINUTE ENTRY MADE ON MONDAY, APRIL  
14, 1913.

No. 53.

CHARLES W. CLARK,

Complainant,

vs.

ARIZONA MUTUAL SAVINGS & LOAN AS-  
SOCIATION and ARIZONA TRUST COM-  
PANY,

Defendants.

This matter came on this day regularly to be heard upon the motion of John Dennett, Jr., one of the interveners herein to strike the petition of J. L. Warring et al., for intervention from the files, William M. Seabury, Esquire, appearing as counsel for the said intervener and Benton Dick, Esquire, appearing as counsel for the petitioners. Argument of the respective counsel was had *the* the matter being fully submitted to the Court, and the Court being fully advised in the premises, does deny said motion. [25]

**[Order Denying Petition of J. L. Warring et al. for  
Leave to Intervene.]**

*In the United States District Court for the District  
of Arizona.*

MINUTE ENTRY MADE ON MONDAY, APRIL  
14, 1913.

No. 53.

CHARLES W. CLARK,

Complainant,

vs.

ARIZONA MUTUAL SAVINGS & LOAN ASSO-  
CIATION and the ARIZONA TRUST COM-  
PANY,

Defendants.

This matter came on this day regularly to be heard upon the petition of J. L. Warring and others for leave to intervene herein, Benton Dick, Esquire, appearing as counsel for the said petitioners and William M. Seabury, Esquire, as counsel for John Dennett et al., interveners. Argument of the respective counsel was had and the matter being fully submitted to the Court, and the Court being now fully advised in the premises, does deny said petition for the reason that it does not contain facts sufficient to sustain the order prayed for. [26]

**[Order Directing Receiver to Give a Bond in the Sum  
of \$25,000.]**

*In the United States District Court for the District  
of Arizona.*

MINUTE ENTRY MADE ON MONDAY, APRIL  
14, 1913.

No. 53.

CHARLES W. CLARK,

Complainant,

vs.

THE ARIZONA MUTUAL SAVINGS AND LOAN  
ASSOCIATION and the ARIZONA TRUST  
COMPANY,

Defendants.

It is by the Court ordered that the receiver herein  
give a bond in the sum of Twenty-five Thousand  
Dollars (\$25,000.00), *condition* upon a faithful dis-  
charge of his duties as said receiver, said bond to be  
approved by the Court. [27]

**[Order Approving Bond of Receiver.]**

*In the United States District Court for the District  
of Arizona.*

MINUTE ENTRY MADE ON TUESDAY, APRIL  
15, 1913.

No. 53.

CHARLES W. CLARK,

Complainant,

vs.

ARIZONA MUTUAL SAVINGS & LOAN ASSO-  
CIATION and the ARIZONA TRUST COM-  
PANY,

Defendants.

It is by the Court ordered that the bond of Sims  
Ely, as receiver, in the sum of Twenty-five Thousand  
Dollars (\$25,000.00), with the American Surety Com-  
pany of New York as surety, be and the same is  
hereby approved. [28]

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*In the District Court of the United States for the  
District of Arizona.*

CHARLES W. CLARK,

Complainant,

vs.

ARIZONA MUTUAL SAVINGS AND LOAN AS-  
SOCIATION and ARIZONA TRUST COM-  
PANY,

Defendants.



**Motion [to Set Aside Decree and That Petitioners be  
Allowed to Intervene].**

Come now the petitioners in intervention and move this Honorable Court that the decree heretofore, and on the 27th day of February, 1913, entered in the above-entitled cause be set aside and held for naught, and that petitioners be allowed to intervene and for such other and further relief as the Court may deem equitable.

That said motion is based upon the verified petition of petitioners hereto attached.

ROBERT E. MORRISON,  
JOSEPH E. MORRISON and  
BENTON DICK,

Solicitors and Attorneys for Petitioners.

To the Defendants Arizona Mutual Savings and Loan Association and Arizona Trust Company and Sims Ely, Receiver.

You will please take notice that the foregoing motion will be presented to this Honorable Court as soon as counsel can be heard.

ROBERT E. MORRISON,  
JOSEPH E. MORRISON and  
BENTON DICK,

Solicitors and Attorneys for Petitioners. [29]

**[Petition of J. L. Waring et al. for Leave to  
Intervene.]**

*In the District Court of the United States for the  
District of Arizona.*

IN EQUITY.

CHARLES W. CLARK,

Complainant,

vs.

ARIZONA MUTUAL SAVINGS AND LOAN AS-  
SOCIATION and ARIZONA TRUST COM-  
PANY,

Defendants.

The petition of J. L. Waring, C. T. Wise, Frank Pister, Mrs. C. F. Richardson, Lulu Y. Carruthers, Daniel Hibbard, G. E. Phelps, Lesuer & Co., J. H. Barnett, R. N. Stapley, C. H. Schultz, R. W. Wagoner, Frank W. Smakel, Thomas A. Rickel, Fred Hensing, Margaret Babbett, David B. Lovell, J. W. Francis, G. I. Smith, August P. New, Edgar A. Brown, Martin F. Taylor, August Johnson, John P. Steinmetz, August Schwalbe, Irving De Vry, Inocente Morales, Oscar Emerson, Stella Wade, John F. Klock, F. W. Smith, Chas. Cahn, Maude Webster, Elmer G. Carroll, Francis X. Courard, B. Hock, John Wagner, Mariana Pascale, J. Knox Corbett, Sarah Oliver, Y. M. Gallegos, D. W. Ellsworth, Ernestine B. Robles, Rena Ridley, J. T. Griffiths, Joshua Willis, Versa Willis, Pearl Bailey, Emma B. Jennings, D. Keith, J. S. Merritt, W. H. Merritt, Frank L. Burgett, M. A. Roberts, Chlora Polk, Nellie I.

Roberts, Lizzie Polk, Charlotte Monroe, P. W. Black, Mrs. L. B. Allison, Henry O. Jaasted, Mrs. I. Bartholomew, Martha A. Kreiling, Thomas W. Massie, Hurum Brinkerhoff, F. T. Willis, D. C. Palmer, T. R. Blomberg, D. F. Goggans, Franklin E. Potts, Demetrio Romero, Andrew P. Martin, J. G. Sturgeon, Leonor Federico, J. M. Biggs, B. Caretto, James J. Devine, Roger W. Bishoff, Albert Sandoval, Nelson Gorman, Minnie C. Blesi, Elene V. Lincoln, Amalia Scheurle, Sarah E. Marsh, Elizabeth C. Devine, Annie H. Curley, Charles L. Day, R. C. Smith, E. A. Jacobs, Virginia A. Rosenfeld, [30] Harry B. Wilcox, C. N. Cotton, Joseph Morello, L. F. Kuhn, William Ham, Archie Chisholm, J. W. McLaughlin, intervening petitioners herein, through their attorney and solicitors, Joseph E. Morrison and Benton Dick, and respectfully allege and show to this Honorable Court:

(I.)

That heretofore, and on the 15th day of July, 1912, there was filed in this Honorable Court a bill of complaint in equity, wherein one Charles W. Clark was complainant and the Arizona Mutual Savings and Loan Association and the Arizona Trust Company were defendants; that said suit was brought by the complainant above named, in behalf of himself and all others similarly situated as stockholders in the defendant, the Arizona Mutual Savings and Loan Association, for the relief prayed for in said bill of complaint, and that the final decree in said cause was entered on the 27th day of February, 1913, as hereinafter set forth.

(II.)

That all of your petitioners except John Wagner have been stockholders in the Arizona Trust Company since about the 1st day of May, 1912, and that your petitioner, John Wagner, has been a stockholder in the Arizona Mutual Savings and Loan Association since about the 1st day of April, 1911.

(III.)

That your petitioners desire to intervene in the above-entitled cause in support of the allegations contained in complainant's bill heretofore filed herein and in support of the allegations in this petition to the end that the rights of your petitioners, and each of them, as well as those who have not joined in this petition, in connection with all of the matters set forth in said complainant's bill and said petition may be submitted to the jurisdiction of this Court, by it to be dealt with in accordance with law and equity and the rules [31] and practice of this Honorable Court. And in this connection your petitioners, in support of this their petition for leave to intervene herein, refer to and beg leave to make a part hereof, each and every paragraph of complainant's bill of complaint herein, in so far as the same may be applicable to the case of your petitioners.

(IV.)

That in addition to the matters set forth by reference to complainant's bill as aforesaid, your petitioners herein, who are stockholders in the defendant Arizona Trust Company as aforesaid, allege that heretofore each of said stockholders was a stockholder in the defendant Arizona Mutual Savings and



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Loan Association and as such entitled to all the rights and privileges of such stockholder in and to their proportionate shares of the assets and properties of said Arizona Mutual Savings and Loan Association. That at various times subsequent to April, 1911, your petitioners were induced to surrender their stock in the Arizona Mutual Savings and Loan Association, by the false and fraudulent representations made to them by the Arizona Trust Company and the Arizona Mutual Savings and Loan Association.

(V.)

That on or about the 11th day of September, 1912, a receiver was appointed for the Arizona Mutual Savings and Loan Association and on or about the 9th day of November, 1912, a receiver was appointed for the Arizona Trust Company; that your petitioners had no notice of the appointment of said receivers nor any knowledge whatsoever of said appointments; that your petitioners were unaware that said companies were in the hands of a receiver and insolvent until some time in the month of February, 1913; that after the appointment of a receiver for the Arizona Trust Company, as [32] aforesaid, the affairs of said company were so conducted that your petitioners were kept in ignorance of the true conditions, with the result that several of your petitioners made payments on their stock to the Arizona Trust Company at the office of said company in the city of Phoenix, which said payments were accepted by persons in charge of the office of said company and who represented or pretended to represent said company,

when in truth and in fact said persons represented the receiver thereof and that said payments, so made as aforesaid, were accepted by said persons without notice to your petitioners that said concern was in the hands of a receiver.

(VI.)

That on the 27th day of February, 1913, a final decree was entered in the above-entitled cause in which it was adjudged that certain intervening stockholders in the Arizona Mutual Savings and Loan Association and the Arizona Trust Company should receive the sums set opposite their respective names in said decree, which said decree is by reference made a part hereof; that none of your petitioners were mentioned in said decree; that no notice was given petitioners of any pending suit; that petitioners were unaware that said companies were insolvent or that any suit was pending or that their rights were not protected until after the 27th day of February, 1913, that the rights of petitioners have not been determined, and unless said decree is set aside the rights of your petitioners will not be protected for the reasons hereinafter set forth.

(VII.)

That said decree, so entered on the 27th day of February, 1913, as aforesaid, is inaccurate and does not conform with the facts and the records of said companies, in that the names of several stockholders are duplicated therein and that in some instances larger amounts are decreed and ordered paid [33] than the amounts paid in by said stockholders.

(VIII.)

Petitioners further aver that on the 19th day of

March, 1913, Sims Ely, Receiver of the Arizona Mutual and Arizona Trust Companies, entered into an agreement with one J. W. Walker whereby said receiver agreed to dispose of certain real estate to the said J. W. Walker, and that one W. T. Smith guaranteed, or attempted to guarantee, the performance by said J. W. Walker of all his undertakings in that behalf; that petitioners are informed and believe, and therefore state the fact to be, that the price agreed upon between said receiver and said Walker, for said property, is wholly inadequate; that said W. T. Smith, who guaranteed, or attempted to guarantee, the performance of said contract by said Walker, as aforesaid, is the identical W. T. Smith who was president of said Arizona Trust Company for some months prior to the time the receivership proceedings were instituted and who was largely responsible for the failure and insolvency of said company; and that the said Walker and the said Smith have for a number of years been closely associated in different business transactions, and that your petitioners verily believe that the object of making said agreement for the sale of said property was to enable said Smith to cover up former transactions which were detrimental to the best interests of the stockholders; that since said Smith has ceased to be an officer of the said company, and during different stages of the receivership of the Arizona Mutual and Arizona Trust Companies, said Smith and said Walker have dominated and controlled the affairs of said companies, and that they are now attempting to dominate and control the affairs of

said companies and to dictate the policy of the receiver; that the price agreed by said Walker to be paid for said land is, as petitioners are informed and believe and therefore state [34] the fact to be, less than one-half of its actual cash value and that your petitioners verily believe that there is collusion between said Smith and said Walker to purchase said property for much less than its actual value.

(IX.)

That the sums which the receiver is authorized to pay to the various intervening stockholders in the Arizona Mutual and Arizona Trust Companies, under and by virtue of the decree, as aforesaid, nearly equal the present available assets of said companies, and if the sale by said receiver to said Walker is consummated, all of the available assets will have been consumed and nothing will be left for petitioners unless the contract between said receiver and said Walker is rescinded and said decree set aside; that if said decree is not set aside your petitioners will sustain a total loss of all money invested in said companies and will not receive their proportionate share of the assets of said companies nor any thereof.

(X.)

That the said Arizona Mutual Savings and Loan Association and the Arizona Trust Company are wholly insolvent and unable to meet and discharge the various obligations assumed by said companies and that your petitioners have no adequate remedy at law to redress the wrongs and grievances herein



set forth except in a court of equity, and in the above-entitled cause.

Wherefore, your petitioners, and each of them, respectfully pray this Honorable Court;

First. That they and each of them may be permitted to intervene in the above-entitled cause and join in the prayer of the complaint therein.

Second. That the final decree entered in the above-entitled action on the 27th day of February, 1913, be set aside and held for naught and that said case be re-opened and that your [35] petitioners be allowed to intervene to the end that their rights may be protected.

Third. That the order of Court, if any there was, confirming the agreement of sale between the receiver and J. W. Walker be vacated and that the receiver be ordered to rescind said agreement.

Fourth. Your petitioners, who are stockholders in the defendant Arizona Trust Company, pray that the transaction whereby said petitioners assigned and transferred their stock in the defendant Arizona Mutual Savings and Loan Association for stock in the defendant Arizona Trust Company may be rescinded and declared to be of no force and effect.

Fifth. That a restitution or reassignment to the said petitioners of the stock in the Arizona Mutual Savings and Loan Association so transferred by them to the defendant Trust Company be adjudged and decreed and that the cancellation of the certificates of stock received by said petitioners from said Trust Company, as aforesaid, may be ordered.

Sixth. That it be adjudged and determined that

the transaction whereby your petitioners gave up their stock in the defendant Loan Association for stock in the defendant Trust Company is wholly void and of no effect.

Seventh. That the defendant Trust Company be required to make complete restitution of all of the properties heretofore received by it from the defendant Arizona Mutual Savings and Loan Association, together with the interest and income thereon.

Eighth. That said restitution be made to the receiver for the purpose of preserving and taking into his possession all of the assets of both of said defendants and to the end that full and complete justice and equity may be done between all of the parties hereto.  
[36]

Ninth. That an accounting between both of said defendant companies be had as well as an accounting between the said defendants and their respective stockholders, and that a master be appointed to take proofs of the facts herein alleged and to determine the rights and equities of all the parties concerned therein, and that the affairs of both companies be wound up, their assets marshalled and distributed to whomsoever may be adjudged to be entitled thereto.

Tenth. That said receiver be restrained from paying any fees or other expenses except upon an order of this Honorable Court until an accounting is had and a hearing touching your petitioners rights in the premises.

Eleventh. That your petitioners have such other and further relief as to the Court may seem meet and

proper, together with the costs and disbursements in this action expended.

ROBERT E. MORRISON,  
JOSEPH E. MORRISON,  
BENTON DICK,

Solicitors and Attorneys for Petitioners.

United States of America,  
State of Arizona,—ss.

Benton Dick, being first duly sworn, deposes and says: That he is one of the solicitors and attorneys for the petitioners above named; that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge except as to matters therein stated on information and belief and as to those matters he believes it to be true; that this verification is made for and on behalf of said petitioners.

BENTON DICK. —

Subscribed and sworn to before me this 15th day of July, 1913.

[Seal of Court]

ALLAN B. JAYNES,  
Clerk United States District Court,  
By Frank E. McCrary,

Deputy. [37]

[Endorsements]: No. 53. In the District Court of the United States for the District of Arizona. Charles W. Clark, Complainant, vs. Arizona Mutual Savings and Loan Association and Arizona Trust Company, Defendants. Petition. Robert E. Morrison, Joseph E. Morrison and Benton Dick, Solicitors and Attorneys for Petitioners. Filed July 15,

*Arizona Mutual Savings & Loan Assn. et al.* 39  
1913, at — M. Allan B. Jaynes, Clerk. By  
Frank E. McCrary, Deputy. [38]

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*In the District Court of the United States for the  
District of Arizona.*

CHARLES W. CLARK,

Complainant,

vs.

ARIZONA MUTUAL SAVINGS AND LOAN  
ASSOCIATION and ARIZONA TRUST  
COMPANY,

Defendants.

**Intervening Petition of Farmers and Merchants'  
Bank, Phoenix.**

To the Honorable Judge of the District Court of the  
United States, for the District of Arizona:

The petition of the Farmers and Merchants' Bank,  
Phoenix, the intervener and petitioner above named,  
respectfully shows and alleges:

I.

As more fully appears in the records of this court  
herein, to all of which your petitioner begs leave  
to refer and to make a part hereof, as though set  
forth at length, the complainant in the above-entitled  
cause was at all times hereinafter mentioned a citi-  
zen of the State of California, domiciled and resi-  
dent at San Mateo, in the State of California, and  
that each of the defendants above named were at all  
times hereinafter stated domestic corporations, or-  
ganized and existing under and by virtue of the laws  
of the Territory, now State of Arizona, and having



their principal places for the regular transaction of business in the city of Phoenix, in said State, and that the matter in controversy in the above-entitled cause arose between citizens of different states as aforesaid, namely: between the complainant as a citizen [39] of the State of California, and each of the defendants as corporate citizens of the State of Arizona, and such controversy was of a civil nature in equity where the matter in controversy exceeds, exclusive of interests and costs, the sum or value of Three Thousand (\$3,000.00) Dollars.

## II.

That this Court's jurisdiction of this intervening petition, and of the said matters involved therein, is ancillary in nature and depends upon the pendency of the above-entitled cause and of the exclusive jurisdiction now exercised by this Honorable Court by and through its said receiver herein, over the *res* and subject matter involved in the above-entitled cause as hereinafter more fully set forth.

## III.

At all times hereinafter mentioned, your petitioner, the Farmers and Merchants' Bank, Phoenix, above named, was a corporation duly organized and existing under and by virtue of the laws of the Territory, now State, of Arizona, and that your said petitioner maintained, until recently, its regular place of business in the city of Phoenix, in the State of Arizona, and was engaged in a general banking business at said place.

## IV.

On or about July 15th, 1912, the above-entitled

cause was instituted in this court.

Said suit was brought by complainant as a stockholder in the defendant Arizona Mutual Savings and Loan Association, for the benefit of complainant, as such, and for the benefit of all others similarly situated, and that in and by said suit said complainant sought the appointment of a receiver of said defendant Loan Association, the marshalling of its assets, the winding up of its business and the distribution [40] of all of its assets and properties to whomsoever might lawfully be entitled thereto, and that the said cause was brought to set aside a transfer of each and all of the properties of the defendant Loan Association which had theretofore been made by said defendant to the defendant Trust Company, with full knowledge on the part of the defendant Trust Company of the illegality of the said transfer, and all the rights of the complainant above named in and to all of the properties of the defendant Loan Association and all the rights of other stockholders of the defendant Loan Association therein.

Your petitioner alleges that process was duly issued in said cause and jurisdiction over each of the defendants above named duly secured and obtained, and that the jurisdiction of this court so obtained over the defendants and the properties of said defendants was and is exclusive in character, and drew to this Court the exclusive right to hear and determine all matters necessarily relating to the subject matter of said controversy, and that such proceedings were had in the above-entitled cause. That on or about August 6th, 1912, this learned Court, pre-

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sided over by the Honorable William M. Morrow, Circuit Judge for this Circuit, sitting at San Francisco, in the State of California, ordered the appointment of a receiver of both the defendants above named upon the terms then set forth in said order. Thereafter, and on or about September 11th, 1912, George D. Christy was appointed receiver of a portion of the assets of the defendant Loan Association by the Honorable Richard E. Sloan, Judge of the District Court of the District aforesaid, and that thereafter, and on or about November 16th, 1912, said receivership was enlarged and extended to and over all of the assets and properties of every kind and nature then and there belonging to the defendant Loan Association, and that still later, and on or about February 1st, 1913, Sims Ely was appointed temporary [41] receiver by this Honorable Court of all the assets and properties of the defendant Trust Company.

On or about February 27th, 1913, this cause came on for trial before the above-entitled court and was tried and resulted in a final decree in favor of the persons who had prior thereto duly intervened in the above-entitled cause, which persons aggregated approximately ninety persons in number and who were designated and described as interveners Nos. 1, 2, 3, and 4. In and by the terms of said final decree of February 27th, 1913, said Sims Ely, Esq., was duly appointed permanent receiver of both the defendants above named, since which time the said receiver has continued to and now is acting as the duly qualified and authorized permanent receiver

of each of the defendants above named, and as such is in physical possession of all of the assets and properties of the defendant Trust Company thus far obtainable by said receiver.

In and by the terms of the said final decree herein, it was adjudged and determined, among other things, that each of the interveners then of record in said cause and described in intervening petitions filed herein and designated as Nos. 1, 2, 3, and 4, as well as each and all of the stockholders of the defendant Loan Association who then and there remained as stockholders in said Loan Association and who had not, in any way, exchanged their stock therein for stock in the defendant Trust Company, and had not otherwise impaired their status as stockholders in said Loan Association, were entitled to and had a lien for the respective amounts heretofore paid in to the said defendants by the said persons last described as fixed by said decree, and the said Sims Ely, as permanent receiver for the defendants above named, was directed, among other things, to sell so much of the properties of the defendants above named as might be necessary to enable him to satisfy, pay and discharge the said liens so established and fixed by the terms of the said final decree of [42] February 27th, 1913, and to pay the surplus, if any thereafter remaining, to the defendant Trust Company for the benefit of those lawfully entitled thereto.

Your petitioner further alleges that the approximate value of the estate of the defendants above named then in the custody and possession of this



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Court through its said permanent receiver was in the neighborhood of Seventy Thousand (\$70,000.00) Dollars, and that the approximate amount of the liens so established and fixed by the terms of the said final decree herein, amounted to about the sum of Fifty Thousand (\$50,000.00) Dollars. And your petitioner alleges that after the payment of the said liens so established and fixed by the terms of the said final decree, as directed therein, there will be a surplus due and payable to the defendant Trust Company above named under and by virtue of said final decree.

V.

Your petitioner further alleges that the defendant Trust Company is and at all times hereinafter mentioned, has been, wholly insolvent and unable to meet and discharge its obligations to its creditors.

VI.

Heretofore, and on or about July 12th, 1913, your said petitioner obtained a judgment, a certified copy of which is hereto annexed and made a part hereof, against the defendant, Arizona Trust Company. The said judgment was recovered by your said petitioner in the Superior Court of the State of Arizona, in and for the County of Maricopa, in a cause then pending in said court wherein your petitioner was plaintiff and the defendant Trust Company above named was defendant, and that the said judgment is for a sum of money only in the amount of Eighteen Thousand Five Hundred (\$18,500.00) Dollars, with interest thereon from April 5th, 1912, until paid, and said judgment declares and establishes [43]

the said sum of Eighteen Thousand Five Hundred (\$18,500.00) Dollars, with interest thereon as aforesaid, as the sum now justly due and owing from the defendant Trust Company above named to your petitioner herein. Your petitioner further alleges that at the time of entry of the said judgment in the said Superior Court, the said permanent receiver of each of the defendants above named was then and there in full and exclusive possession of all of the properties of the defendant Trust Company above named, and that by reason of this fact and of the matters herein set forth, your petitioner could not, without a contempt of this Honorable Court, issue execution upon its said judgment against the defendant above named, or do any other act for the purpose of satisfying its said judgment out of the properties of the defendant Trust Company above named, or any part thereof, and because of the matters herein set forth, no execution was, in fact, issued upon your petitioner's said judgment, and that the reason why no such execution issued upon said judgment was because of the matters herein set forth and also because a conflict of jurisdiction might and would have resulted between the said Superior Court of the State of Arizona in and for the County of Maricopa and this Honorable Court if the said execution had issued and a levy thereunder had been made or attempted.

And your petitioner further alleges that it is remediless in the premises and can do nothing to collect its said judgment except by and with the consent and approval of this Honorable Court. And your

petitioner further alleges that by reason of the present limited scope of the receivership of the defendant Trust Company, as described by the terms of the said final decree herein of February 27th, 1913, to which your petitioner begs leave to refer as though set forth at length herein, the said receivership should, in justice to your petitioner herein and for its benefit and for the benefit of other judgment creditors of the [44] defendant Trust Company above named as may be similarly situated, and for the benefit of all those having or claiming to have rights and claims against the said defendant Trust Company, this Honorable Court should extend the said present receivership to your petitioner's said judgment and to the rights of the others herein last described to the end that the rights, claims and priorities of each and all of the persons having or claiming to have claims against the defendant above named may be ascertained and determined according to law.

## VII.

And your petitioner further alleges that in addition to the assets now in the hands of the said receiver, assets and property belonging to the defendant Trust Company to the extent of many thousands of dollars should be recovered of and from the former officers and directors of the said defendant Trust Company, among others particularly from one A. J. Edwards, W. T. Smith and John T. Dunlap, and to the end that the insolvent estate of the said defendant Trust Company may thereby be increased for the benefit of your said petitioner and

others similarly situated, your petitioner alleges that the liability of each of the persons last named to account to the said defendant Trust Company or to the receiver thereof heretofore duly appointed by this Honorable Court consists and arises out of the following matters, namely:

### VIII.

On information and belief, your petitioner alleges that at all times hereinafter mentioned in this paragraph, one A. J. Edwards was an officer and director of the defendant Trust Company, and at all such times occupied a position of trust and confidence towards the said defendant Trust Company and towards its creditors and stockholders. That during all of said period, the said A. J. Edwards was in complete control and had the management of the said defendant Trust Company and in the exercise of his [45] duties as an officer and director and as manager of the defendant Trust Company, completely dominated and controlled the policy of the defendant Trust Company and all of its internal operations and business. That between June 2d, 1911, and June 21st, 1912, the said A. J. Edwards, while acting as aforesaid, drew from the funds of the defendant Trust Company and improperly disbursed sums aggregating Fourteen Thousand Five Hundred Twenty-two and Sixty-eight One-hundredths (\$14,522.68) Dollars. That much of these funds, and substantial amounts thereof, the exact amounts of which are unknown to your petitioner, were, in reality, received by the said A. J. Edwards individually and applied and converted to his own



personal use, for which the said Edwards has never accounted to the said defendant Trust Company, and for which he should be required forthwith to account. That in addition to the said sum of Fourteen Thousand Five Hundred Twenty-two and Sixty-eight One-hundredths (\$14,522.68) Dollars, for which the said A. J. Edwards should account, the said A. J. Edwards should be required to account for delivering to one Kline about Seven Thousand (\$7,000.00) Dollars worth of securities then and there belonging to the defendant Loan Association and for delivering to one Alice U. Solomon, securities of the defendant Loan Association of the approximate value of Forty-five Hundred (\$4,500.00) Dollars. And as to the said transactions with the said Kline and Solomon, your petitioner alleges that between the dates stated, the said Kline and the said Solomon were each stockholders in the defendant Loan Association, each being in a position substantially similar to the complainant above named and to other stockholders in the defendant Loan Association, and as such, not entitled to any priority or preference in the distribution of the assets of the defendant Loan Association over and above other stockholders similarly situated. That notwithstanding said fact, and notwithstanding the fact that the said [46] Edwards then and there well knew that the defendant Loan Association and the said defendant Trust Company were then and there wholly insolvent and unable to pay and discharge in full the obligations of each of said companies to their respective creditors and stockholders, the said Edwards, without any

right or authority so to do, and without any lawful consideration to the said defendant Loan Association or defendant Trust Company, voluntarily delivered to the said Kline and to the said Solomon the securities of the defendant Loan Association as hereinbefore stated, and that at the present time, as your petitioner is informed and verily believes, the said Kline is still in possession of the said securities so delivered to him by the said Edwards as aforesaid, and that although the securities so delivered to the said Solomon by the said Edwards as aforesaid are now the subject of a replevin suit wherein the receiver of the defendants above named is plaintiff and the said Alice U. Solomon, defendant, is still pending undetermined before this Honorable Court, the said A. J. Edwards is accountable to the defendant Trust Company and should be made to repay to it or to the receiver thereof each and all of the sums of money so lost to the said defendant Trust Company by reason of the said unlawful and improper acts of the said Edwards while acting as an officer and director thereof. And in addition to the matters herein set forth and between the dates last mentioned, the said A. J. Edwards negotiated a loan for the alleged benefit of the said defendant Trust Company from the Valley Bank, a corporation organized and existing under and by virtue of the laws of the Territory, now State, of Arizona, and having its principal place of business in the city of Phoenix, in said State. That the said loan, as your petitioner is informed and verily believes, approximated Six Thousand (\$6,000.00) Dollars in amount, and as al-

leged security for the repayment of the said loan of Six Thousand (\$6,000.00) Dollars to the said Valley Bank by the [47] Arizona Trust Company, the said A. J. Edwards caused to be deposited with the said Valley Bank securities then and there the exclusive property of the defendant Loan Association, and in which the defendant Trust Company had no right, title or interest of any kind or character. Upon information and belief, that the said Valley Bank then and there so received the said securities and continued to hold the same as alleged security for the repayment to it by the defendant Trust Company of the said loan of Six Thousand (\$6,000.00) Dollars, but your petitioner alleges, upon information and belief, that the said Valley Bank then and thereafter, and at all times, had full and complete knowledge and notice of the fact that the said securities were not then the property of the defendant Loan Association, and upon information and belief, your petitioner alleges the fact to be that the said Valley Bank accepted and received the said securities, charged with knowledge and notice of the transactions theretofore had between the said defendants Arizona Mutual Savings and Loan Association and the Arizona Trust Company, and that the said Valley Bank did not then, nor did it thereafter acquire a valid lien upon said securities, or any of them, as against or superior to the rights created and now existing in favor of your said petitioner under and by virtue of the said judgment obtained by your said petitioner against the said defendant Trust Company on July 12th, 1913, And

that such claim as the said Valley Bank has for the return of its Six Thousand (\$6,000.00) Dollars is exclusively an unsecured claim against the defendant Trust Company, and that the receiver of the said defendant Trust Company should take such proceedings as may be proper for the recovery of said securities now in possession of the said Valley Bank, to the end that the said claim of the Valley Bank against the said Trust Company may be paid out of the general assets of the defendant Trust Company, and not [48] satisfied out of the securities so delivered to the said Valley Bank as aforesaid to the detriment of your said petitioner and other judgment creditors of the said defendant Trust Company, or in the alternative that such action may be taken by the receiver herein for the protection of the equity in the said securities now in the possession of the said Valley Bank as to the Court may seem right and proper.

### IX.

On information and belief, your petitioner further alleges that on or about June 21st, 1912, one W. T. Smith and John T. Dunlap acquired all of the alleged common stock in the defendant Trust Company, theretofore claimed to be owned by the said A. J. Edwards, and that by virtue of the acquisition of said stock from and after June 21st, 1912, the said W. T. Smith and the said John T. Dunlap immediately assumed full and complete charge and control and management of all the properties, assets and affairs of the said defendant Trust Company, and thereafter, and until in or about the month of De-



cember, 1912, continuously exercised complete dominion and control over the assets and properties of the said defendant Trust Company and of all of its said affairs, as officers and directors thereof. That during said period, the said W. T. Smith and the said John T. Dunlap occupied a position of trust and confidence towards the defendant Trust Company and towards its stockholders and creditors, and were officers and directors of the said defendant Trust Company. That notwithstanding the position of trust and confidence so occupied by the said Smith and Dunlap with reference to the defendant Trust Company, its creditors and stockholders, your petitioner alleges, upon information and belief, that the said Smith and Dunlap violated their duties as officers and directors of the said defendant Trust Company and managed the affairs of the said defendant Trust Company exclusively for their own benefit instead of for the benefit [49] of the stockholders thereof and the creditors of said defendant Trust Company.

That in so doing the said Smith and Dunlap, in wilful disregard and violation of their said duties as officers and directors of the said insolvent Trust Company, made unlawful and inequitable disposition of the assets and properties then claimed to be owned by the said defendant Trust Company, and so disposed of many thousands of dollars of assets and properties of the said defendant Trust Company, without any lawful right or authority so to do, the exact amount of which is unknown to your petitioner.

Among the wrongful and unauthorized and unlawful dispositions of the properties of the defendant Trust Company, so made by said Smith and Dunlap, as hereinbefore set forth, your petitioner alleges, upon information and belief, that the said Smith and Dunlap, during the period aforesaid, made the following so-called "ledger settlement," namely:

(a) During the period aforesaid, one C. W. Quinn was and had been a stockholder in the defendant Loan Association, and was then and there indebted to the defendant Loan Association or to the defendant Trust Company for money theretofore loaned to the said C. W. Quinn by one of said defendants, in the neighborhood of Seven Hundred Twenty-one and Fifty One-hundredths (\$721.50) Dollars, but notwithstanding the fact that both the said defendants were then and there insolvent, as aforesaid, and the stock therein then owned by the said C. W. Quinn was not of the value of the said sum of Seven Hundred Twenty-one and Fifty One-hundredths (\$721.50) Dollars, the said Smith and Dunlap nevertheless, in violation of their duties as aforesaid, and contrary to the interests of your petitioner as a creditor of the defendant Trust Company, accepted an assignment of all of such stock as the said C. W. Quinn then owned in one or both of the defendant companies, and in exchange for said assignment, purported [50] to cancel and discharge the indebtedness of the said C. W. Quinn in favor of the said defendants above named for the sum of Seven Hundred Twenty-one and Fifty One-hundredths (\$721.50) Dollars, which transaction resulted in a

loss to the said defendants above named, by reason of the conduct of the said Smith and Dunlap, of approximately Seven Hundred Twenty-one and Fifty One-hundredths (\$721.50) Dollars.

(b) That during the period aforesaid, one R. W. Moyne was and had been a stockholder in the defendant Loan Association, and was then and there indebted to the defendant Loan Association or to the defendant Trust Company for money theretofore loaned to the said R. W. Moyne by one of said defendants, in the neighborhood of Seven Hundred Ninety-seven and Forty-five One-hundredths (\$797.45) Dollars, but notwithstanding the fact that both the said defendants were then and there insolvent, as aforesaid, and the stock therein then owned by the said R. W. Moyne was not of the value of the said sum of Seven Hundred Ninety-seven and Forty-five One-hundredths (\$797.45) Dollars, and notwithstanding the further fact that the said R. W. Moyne was then and there financially able to pay and discharge his said indebtedness to the said defendants above named, the said Smith and Dunlap, nevertheless, in violation of their duties as aforesaid, and contrary to the interests of your petitioner as a creditor of the defendant Trust Company, accepted an assignment of all of such stock as the said R. W. Moyne then owned in one or both of the defendant companies, and in exchange for said assignment, purported to cancel and discharge the indebtedness of the said R. W. Moyne in favor of the said defendants above named for the sum of Seven Hundred Ninety-seven and Forty-five One-hundredths

(\$797.45) Dollars, which transaction resulted in a loss to the said defendants above named, by reason of the conduct of the said Smith and Dunlap, of approximately Seven Hundred Ninety-seven and Forty-five One-hundredths [51] (\$797.45) Dollars.

(c) That during the period aforesaid, one J. J. Murphy was and had been a stockholder in the defendant Loan Association, and was then and there indebted to the defendant Loan Association or to the defendant Trust Company for money theretofore loaned to the said J. J. Murphy by one of said defendants, in the neighborhood of Six Hundred Seven (\$607.00) Dollars, but notwithstanding the fact that both the said defendants were then and there insolvent, as aforesaid, and the stock therein then owned by the said J. J. Murphy was not of the value of the said sum of Six Hundred and Seven (\$607.00) Dollars, and notwithstanding the further fact that the said J. J. Murphy was then and there financially able to pay and discharge his said indebtedness to the said defendants above named, the said Smith and Dunlap, nevertheless, in violation of their duties as aforesaid, and contrary to the interests of your petitioner as a creditor of the defendant Trust Company, accepted an assignment of all of such stock as the said J. J. Murphy then owned in one or both of the defendant companies, and in exchange for said assignment, purported to cancel and discharge the indebtedness of the said J. J. Murphy in favor of the said defendants above named for the sum of Six Hundred and Seven (\$607.00) Dollars, which



transaction resulted in a loss to the said defendants above named, by reason of the conduct of the said Smith and Dunlap, of approximately Six Hundred and Seven (\$607.00) Dollars.

(d) That during the period aforesaid, one E. M. Claybridge was and had been a stockholder in the defendant Loan Association, and was then and there indebted to the defendant Loan Association or to the defendant Trust Company for money theretofore loaned to the said E. M. Claybridge by one of the said defendants, in the neighborhood of Nine Hundred (\$900.00) Dollars, but notwithstanding the fact that both the said defendants were then [52] and there insolvent, as aforesaid, and the stock therein then owned by the said E. M. Claybridge was not of the value of the said sum of Nine Hundred (\$900.00) Dollars, and notwithstanding the further fact that the said E. M. Claybridge was then and there financially able to pay and discharge his said indebtedness to the said defendants above named, the said Smith and Dunlap, nevertheless, in violation of their duties as aforesaid, and contrary to the interests of your petitioner as a creditor of the defendant Trust Company accepted an assignment of all of such stock as the said E. M. Claybridge then owned in one or both of the defendant companies, and in exchange for said assignment, purported to cancel and discharge the indebtedness of the said E. M. Claybridge in favor of the said defendants above named for the sum of Nine Hundred (\$900.00) Dollars, which transaction resulted in a loss to the said defendants above named, by reason

of the conduct of the said Smith and Dunlap, of approximately Nine Hundred (\$900.00) Dollars.

(e) That during the period aforesaid, one George S. Rogers was and had been a stockholder in the defendant Loan Association, and was then and there indebted to the defendant Loan Association or the defendant Trust Company for money theretofore loaned to the said George S. Rogers by one of the said defendants, in the neighborhood of Two Hundred Fifty-five (\$255.00) Dollars, but notwithstanding the fact that both the said defendants were then and there insolvent, as aforesaid, and the stock therein then owned by the said George S. Rogers was not of the value of the said sum of Two Hundred Fifty-five (\$255.00) Dollars, and notwithstanding the further fact that the said George S. Rogers was then and there financially able to pay and discharge his said indebtedness to the said defendant above named, the said Smith and Dunlap, nevertheless, in violation of their duties as aforesaid, and contrary to the interests of your petitioner as a [53] creditor of the defendant Trust Company, accepted an assignment of all of such stock as the said George S. Rogers then owned in one or both of the defendant companies, and in exchange for said assignment, purported to cancel and discharge the indebtedness of the said George S. Rogers in favor of the said defendants above named for the sum of Two Hundred Fifty-five (\$255.00) Dollars, which transaction resulted in a loss to the said defendants above named, by reason of the conduct of the said Smith and Dun-

lap, of approximately Two Hundred Fifty-five (\$255.00) Dollars.

(f) That during the period aforesaid, one Isaac Rogers was and had been a stockholder in the defendant Loan Association, and was then and there indebted to the defendant Loan Association or to the defendant Trust Company for money theretofore loaned to the said Isaac Rogers by one of the said defendants, in the neighborhood of Four Hundred Seventy-six (\$476.00) Dollars, but notwithstanding the fact that both the said defendants were then and there insolvent, as aforesaid, and the stock therein then owned by the said Isaac Rogers was not of the value of the said sum of Four Hundred Seventy-six (\$476.00) Dollars, and notwithstanding the further fact that the said Isaac Rogers was then and there financially able to pay and discharge his said indebtedness to the said defendants above named, the said Smith and Dunlap, nevertheless, in violation of their duties as aforesaid, and contrary to the interests of your petitioner as a creditor of the defendant Trust Company, accepted an assignment of all of such stock as the said Isaac Rogers then owned in one or both of the defendant companies, and in exchange for said assignment, purported to cancel and discharge the indebtedness of the said Isaac Rogers in favor of the said defendants above named for the sum of Four Hundred Seventy-six (\$476.00) Dollars, which transaction resulted in a loss to the said defendants above named, by reason of the conduct of the said Smith and Dunlap, of

approximately Four [54] Hundred Seventy-six (\$476.00) Dollars.

(g) That during the period aforesaid, one A. Williams was and had been a stockholder in the defendant Loan Association, and was then and there indebted to the defendant Loan Association, *and was then and there indebted to the defendant Loan Association*, or to the defendant Trust Company for money theretofore loaned to the said A. Williams by one of the said defendants, in the neighborhood of Six Hundred Seventy-eight and Seventy-two One-hundredths (\$678.72) Dollars, but notwithstanding the fact that both the said defendants were then and there insolvent, as aforesaid, and the stock therein then owned by the said A. Williams was not of the value of the said sum of Six Hundred Seventy-eight and Seventy-two One-hundredths (\$678.72) Dollars, and notwithstanding the further fact that the said A. Williams was then and there financially able to pay and discharge his said indebtedness to the said defendants above named, the said Smith and Dunlap, nevertheless, in violation of their duties as aforesaid, and contrary to the interests of your petitioner as a creditor of the defendant Trust Company, accepted an assignment of all of such stock as the said A. Williams then owned in one or both of the defendant companies, and in exchange for said assignment, purported to cancel and discharge the indebtedness of the said A. Williams in favor of the said defendants above named for the sum of Six Hundred Seventy-eight and Seventy-two One-hundredths (\$678.72) Dollars, which transaction re-



sulted in the loss to the said defendants above named, by reason of the conduct of the said Smith and Dunlap, of approximately Six Hundred Seventy-eight and Seventy-two One-hundredths (\$678.72) Dollars.

X.

That in addition to the matters herein set forth, the said Smith and Dunlap so conducted themselves during the period aforesaid as officers and directors of the defendant Trust Company that they, without any right or authority so to do, and without [55] receiving any consideration therefor for the benefit of the defendant Trust Company, unlawfully disposed of an equity which the defendant Trust Company then and there had and possessed in certain land situated in Section 8, at Mesa, Arizona, and purported to transfer the said equity of the defendant Trust Company to one Alfred LeBaron in alleged settlement, or partial settlement, of some claim which the said LeBaron then and there asserted against the defendant Trust Company, but your petitioner alleges, upon information and belief, that the defendant Trust Company never, at any time, received any consideration from the said LeBaron for its said equity in said property, and that the reasonable value of said equity was Three Thousand Seven Hundred Sixty-six (\$3,766) Dollars, which said sum, by reason of the misconduct of the said Smith and Dunlap, as aforesaid, was wholly lost to the defendant Trust Company above named.

XI.

That in addition to the matters herein above set

forth, your petitioner alleges, on information and belief, that by reason of the culpable, wilful and gross neglect and mismanagement of the affairs of the defendant company by the said Smith and Dunlap, the said defendant Trust Company suffered and sustained great losses in connection with the following pieces of property:

(a) At and during the times aforesaid, the defendant Trust Company was the equitable owner under a contract to purchase of approximately one hundred sixty acres of land north of the city of Phoenix, known and described as the Evans Tract. That during the period aforesaid, the said Smith and Dunlap claimed that the defendant Trust Company owned an equity over and above existing encumbrances upon said premises of the value of about Thirty-six Thousand (\$36,000.00) Dollars, but that notwithstanding the said alleged equity in the said premises in favor of the defendant [56] Trust Company, and notwithstanding the fact that the defendant Trust Company did then and there have a substantial equity in the said premises, the exact value of which equity is unknown to your said petitioner, by reason of the improper use of the funds of the defendant Trust Company as heretofore alleged, and because of the misconduct of the said Smith and Dunlap with reference thereto, the said Smith and Dunlap suffered and permitted the former owner of the said Evans Tract, who then and there held a substantial mortgage on said premises, the exact amount of which is unknown to your petitioner, to foreclose the same, and by reason of said

foreclosure and of the failure of the said Smith and Dunlap and of the defendant to protect the said property against such foreclosure, all of the equity of the said defendant Trust Company in and to said tract was lost. And that the loss sustained by the said defendant Trust Company, by reason of the said acts of the said Smith and Dunlap, and their failure properly to protect the said property from foreclosure, amounted to many thousands of dollars, the exact amount of which is unknown to your petitioner, but as your petitioner is informed and verily believes, the said amount does not exceed the sum of Thirty-six Thousand (\$36,000.00) Dollars.

(b) At and during the times aforesaid, the defendant Trust Company was the equitable owner under a contract to purchase of Lot 2, in Block 80 in the City of Phoenix. That during the period aforesaid, the said Smith and Dunlap claimed that the defendant Trust Company owned an equity over and above existing encumbrances upon said premises of the value of about Thirty-seven Thousand (\$37,000.00) Dollars, but that notwithstanding the said alleged equity in the said premises in favor of the defendant Trust Company, and notwithstanding the fact that the defendant Trust Company did then and there have a substantial equity in the said premises, the exact value of which equity is unknown to your [57] said petitioner, by reason of the improper use of the funds of the defendant Trust Company as heretofore alleged, and because of the misconduct of the said Smith and Dunlap with reference thereto, the rights of the defendant Trust Company of, in

and to said premises known as Lot 2, in Block 80 in the City of Phoenix, were rendered subject to forfeiture under and by virtue of the terms of the contract to purchase relating to said property. That approximately Seventy-five Hundred (\$7,500.00) Dollars of the defendant Trust Company's money had been paid to the owner of the said premises, known as Lot 2, in Block 80, in the said City of Phoenix, on account of the purchase price thereof, and that the sum of only about Eight Thousand (\$8,000.00) Dollars in addition thereto was required to be paid upon said contract, which payment, if made, would have entitled the defendant Trust Company to a conveyance of the said premises last described, subject only to a mortgage of approximately Thirty-five Thousand (\$35,000.00) Dollars. That the purchase price of the said premises to the defendant Trust Company was approximately Fifty Thousand (\$50,000.00) Dollars, but that notwithstanding said purchase price, the said Smith and Dunlap claimed the value of said property to be in the neighborhood of Seventy or Eighty Thousand Dollars, and during the period aforesaid, and while the said Smith and Dunlap were in complete control of the affairs of the defendant Trust Company, the said Smith and Dunlap caused statements to be made concerning the value of the said property last described as an asset to the defendant Trust Company, which place the value thereof at the sum of Eighty Thousand (\$80,000.00) Dollars, and place the value of the equity therein in favor of the defendant Trust Company at Thirty-seven Thousand (\$37,000.00) Dollars.



That notwithstanding the great value of the said property, the rights of the defendant Trust Company therein were, as your petitioner is informed and believes, rendered subject to forfeiture, as aforesaid, and thereafter [58] were forfeited and lost to the defendant Trust Company solely by reason of the misconduct of the said Smith and Dunlap and shortly after the said defendant Trust Company had lost all its rights under the said contract to purchase the said Lot 2 in Block 80, in the said City of Phoenix, the receiver of the defendant Trust Company was able to, and did sell his alleged equity of redemption in the said premises, or such rights as he had in connection therewith, if any, for the sum of One Thousand (\$1,000.00) Dollars, and thereafter the said premises were resold by the owner thereof for approximately the sum of Sixty Thousand (\$60,000.00) Dollars, so that your petitioner is informed and verily believes, and so alleges the fact to be, that by reason of the matters herein set forth with reference to Lot 2, in Block 80, in the said City of Phoenix, the said acts of the said Smith and Dunlap caused a loss to the said defendant Trust Company of not more than Thirty-six Thousand (\$36,000.00) Dollars, nor less than Nine Thousand (\$9,000.00) Dollars.

(c) Your petitioner further alleges, on information and belief, that during the period aforesaid, the said defendant Trust Company was the equitable owner, through ownership of stock in the Phoenix Building and Realty Company, of certain premises near the City of Phoenix, known as the Willow

Addition. That said premises were reasonably worth the sum of about Thirty-two Thousand (\$32,000.00) Dollars, but that said premises were then and there subject to a mortgage of Seventeen Thousand (\$17,000.00) Dollars, and that the defendant Trust Company had advanced or expended in connection therewith about Ten Thousand (\$10,000.00) Dollars. That shortly prior to the retirement of the said Smith and Dunlap from the control of the affairs of the defendant Trust Company in or about the month of December, 1912, there was due, or about to become due and owing on account of the said mortgage on the said premises known as the said Willow Addition, a [59] payment of about Three Thousand (\$3,000.00) Dollars, but that by reason of the misconduct of the said Smith and Dunlap, and the improper use and expenditure of the funds of the defendant Trust Company as aforesaid, the said Smith and Dunlap wholly failed and neglected to make the said payment, and by reason of the involved and complicated condition of the title of the said premises known as the said Willow Addition, and because of the involved condition of the affairs of both of the defendant companies, resulting from the acts of the said Smith and Dunlap in connection therewith, when the said Sims Ely, as permanent receiver of the defendants above named, took possession of the premises above set forth, he was unable to dispose of the said premises to anybody except the said Smith and Dunlap and their associates, and that the said receiver was obliged to and did sell all of the right, title and interest of the de-

fendant companies in and to said Willow Addition to one J. Wesley Walker, an associate of the said Smith and Dunlap, as more fully set forth herein, and that while the price received by the said receiver from the said Walker for the interest of the defendant Trust Companies in and to said Willow Addition was and is, as your petitioner is informed and verily believes, a fair and reasonable price therefor under the circumstances relating thereto, nevertheless your petitioner alleges the fact to be, on information and belief, that because of the misconduct of the said Smith and Dunlap in failing properly to protect the interests of the defendant Trust Company in and to the said property known as the said Willow Addition, the said defendant Trust Company had lost at least the sum of Ten Thousand (\$10,000.00) Dollars which it had theretofore advanced on account of the said properties, and the difference between said sum of Ten Thousand (\$10,000.00) Dollars, plus the mortgage of Seventeen Thousand (\$17,000.00) Dollars thereon, and the reasonable value of the said premises, to wit: the sum of about Thirty-two Thousand (\$32,000.00) Dollars, for all [60] of which your petitioner alleges, on information and belief, the said Smith and Dunlap should be required to account.

## XII.

On information and belief, your petitioner alleges the fact to be that at all times between June 20th, 1912, and sometime, the exact date of which is unknown to your petitioner, in and about the month of December, 1912, and thereafter, one J. Wesley Walker was the secret partner and associate of the

said W. T. Smith and the said John T. Dunlap in and about all of the matters relating to the affairs of the defendant Trust Company and the conduct thereof by the said Smith and Dunlap, and upon information and belief, that the said J. Wesley Walker shared and participated in the profits of the said Smith and Dunlap made in connection with the dealings of the said Smith and Dunlap in connection with the properties of the defendant Trust Company, and had agreed to share in such, if any, losses as the said Smith and Dunlap sustained with reference to any of the properties of the defendant Trust Company, and that by reason of the matters herein set forth, the said J. Wesley Walker should be required to account for such secret profits, if any, as he has secured and derived from his said secret partnership with the said Smith and Dunlap relating to the affairs of the said defendant Trust Company.

### XIII.

Your petitioner further alleges, upon information and belief, that there are a large number of stockholders of the defendant Trust Company who are indebted to the defendant Trust Company for the unpaid purchase price and subscription to the stock of the defendant Trust Company, and to the end that the funds in the hands of this Court with which to pay and discharge the debts of the defendant Trust Company to its lawful creditors may be increased in value, the said stockholders of the said defendant [61] Trust Company so indebted to it as aforesaid, should be required to pay in full their said subscriptions to the receiver of the defendant Trust



Company above named.

#### XIV.

And your petitioner further alleges that it has not, and that other creditors of the defendant Trust Company similarly situated have not any other adequate remedy at law or otherwise for the protection of the rights of your said petitioner and others similarly situated except as prayed for herein.

IN CONSIDERATION WHEREOF, and forasmuch as your petitioner is remediless in the premises at and by the strict rules of the common law, and is only relievable in a court of equity, and in this court where matters of this kind are properly cognizable and relievable, your petitioner therefore respectfully prays:

1st. That the receivership heretofore and now existing over the properties and assets of the defendant Trust Company be extended to the judgment of your said petitioner so obtained as aforesaid in the Superior Court of the State of Arizona. in and for the County of Maricopa, not only for the benefit of your said petitioner, but for the benefit of all other judgment creditors of the defendant Trust Company and for the benefit of all those having claims of any kind or character against the defendant above named.

2d. And to the end that full and complete justice and equity may be done between all of the parties hereto, and inasmuch as this Honorable Court, in the exercise of its jurisdiction over the properties of the above-named defendant Trust Company has been obliged to and has taken physical possession thereof, and is now engaged in disposing of said assets for the

purpose of discharging and paying the liens established and fixed by the [62] terms of the final decree of February 27th, 1913, herein, for the benefit of those named therein, and under the well settled rules of practice of this Honorable Court, and in accordance with equity in such cases that where the Court assumes jurisdiction of the matters of any controversy for one purpose, such jurisdiction will be extended and exercised by such Court for all purposes, and to the further end that by so extending the receivership aforesaid as prayed for herein, the rights of all persons and parties having claims against said defendant Trust Company may be ascertained, adjudged and determined herein, and a multiplicity of suits against the defendant Trust Company may thereby be avoided, your petitioner further prays that a master be forthwith appointed by this Honorable Court before whom all claimants may present their claims against the defendant Trust Company, and that notice to each and all of said persons be duly given, according to law, by said master, together with notice that unless all of said claimants present their claims to the said master before a day certain therein to be named, that the rights of each and all of said claimants touching and concerning the properties of the defendant Trust Company above named, may be barred and foreclosed, and that the various priorities of each and all of the persons asserting claims against the defendant Trust Company may be ascertained, adjudged and determined, and that all of the assets and properties of the defendant Trust Company may be marshalled and distributed

to those found to be lawfully entitled thereto, and the affairs of said defendant wound up and finally settled.

3d. And your petitioner further prays that it be adjudged and decreed to be entitled to a preference and priority over and above all other creditors upon all the assets of the defendant Trust Company left and remaining after the payment, discharge and satisfaction of each and all of the liens established [63] and fixed by the terms of the final decree of February 27th, 1913, herein, because of the facts hereinbefore set forth, because of the recovery of its said judgment and because of the diligence of your said petitioner in bringing the matters herein set forth to the attention of this Honorable Court, not only for the benefit of your said petitioner, but also for the benefit of all others similarly situated, and for such other reasons as may duly appear to the Court upon taking proof of the matters herein set forth.

4th. And may it please your Honor to grant unto your said petitioner a Writ of Subpoena of the United States of America, issued out of and under the seal of this Honorable Court, directed to the said A. J. Edwards, the said W. T. Smith, the said John T. Dunlap and the said J. Wesley Walker, and each of them, then and there commanding each of said persons last named, on a day certain therein to be named, and under a certain penalty, to be and appear before this Honorable Court then and there to answer (but not under oath, an answer under oath being expressly waived) all and singular the prem-

ises herein set forth, and to stand to, perform and abide by such order, direction and decree as may be made against them and each of them in the premises as shall seem meet and agreeable to equity and good conscience.

5th. And your petitioner further prays that the said A. J. Edwards, the said W. T. Smith, the said John T. Dunlap and the said J. Wesley Walker, and each of them, be required to make and render to this Honorable Court a full account of their dealings, and of the dealings of each of them, with the affairs and properties of the said defendant Trust Company, and that they, and each of them, be required to make full discovery of and concerning each and all of the acts of each of the said persons last named relating to the matters herein set forth.

6th. And your petitioner further prays that without waiving the right which it respectfully claims and asserts to file [64] this intervening petition herein without leave of this Honorable Court to the end that doubt and confusion concerning the right of your said petitioner thus to intervene may thereby be avoided that consent and leave of this Honorable Court authorizing and permitting your said petitioner to file the foregoing petition herein be granted.

7th. And that your petitioner have such other further and different relief in the premises as to the Court may seem right and proper and for general relief in the premises, and for its costs and expenses herein incurred.



72 *Farmers and Merchants' Bank, Phoenix, vs.*

And your said petitioner, as in duty bound, will ever pray.

(Signed) PAUL RENAU INGLES.

PAUL RENAU INGLES,

Solicitor for Petitioner, Farmers and Merchants'  
Bank, Phoenix, Fleming Building, Phoenix,  
Arizona. [65]

United States of America,  
District of Arizona,  
State of Arizona,  
County of Maricopa,—ss.

J. P. Ivy, being duly sworn, deposes and says: I am the president of the petitioner, the Farmers and Merchants' Bank, Phoenix, above named. I have heard read the foregoing petition and know the contents thereof, and the same is true of my own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters, I believe it to be true.

(Signed) J. P. IVY.

Sworn to before me, this 29th day of July, 1913.

[Notarial Seal]

(Signed) B. L. RUDDEROW,

Notary Public.

My commission expires Sept. 26, 1916. [66]

*In the Superior Court of the State of Arizona, in and  
for the County of Maricopa.*

FARMERS AND MERCHANTS' BANK, PHOE-  
NIX,

Plaintiff,

vs.

ARIZONA TRUST COMPANY,

Defendant.

**Judgment [of Superior Court in Farmers and Mer-  
chants' Bank, Phoenix, vs. Arizona Trust Co.].**

This cause came on regularly for hearing on July 9th, 1913, before the Court, sitting without a jury, a trial by jury having been previously expressly waived by the respective parties to said action.

The plaintiff appearing by Paul Renau Ingles, its attorney, and the defendant by Clyde M. Gandy, its attorney.

Upon motion of attorney for plaintiff, Sims Ely, Receiver, of the defendant herein, heretofore appointed and acting as such in a suit in the United States District Court for the District of Arizona, being numbered ———, was made a party defendant herein.

By virtue of a certain stipulation of counsel for the parties to this action, which was heretofore made in open court, the testimony of the witnesses and the evidence presented to the Court and jury upon a former trial of this cause, was read by the Court upon this trial with the same force and effect as though given in open court.

Said Receiver having filed with this Court a copy of the final decree in said cause in said Federal Court on February 27th, 1913, upon motion of counsel for said Receiver, which motion was consented to by counsel for plaintiff herein, this action was dismissed as to said receiver. [67]

The argument of counsel for the respective parties thereupon being heard and the case being closed and submitted to the Court for its consideration, finding and decision, and the Court having considered the same and being fully advised in the premises, now on this 12th day of July, 1913, the Court finds for the plaintiff and against the defendant herein.

WHEREFORE, by reason of the premises and the law it is ORDERED, ADJUDGED AND DECREED, that Farmers and Merchants' Bank, Phoenix, plaintiff above named, have and recover of and from the Arizona Trust Company, the defendant above named, the sum of Eighteen Thousand Five Hundred Dollars (\$18,500.00), with legal interest thereon from April 5, 1912, until paid, together with the costs herein taxed at ——— Dollars.

Done in open court this 12th day of July, 1913.

(Signed) JOHN C. PHILLIPS,  
Judge.

State of Arizona,  
County of Maricopa,—ss.

I, Wm. E. Thomas, Clerk of the Superior Court of the State of Arizona, in and for Maricopa County, hereby certify that I have compared the foregoing copy with the original Judgment in the above-entitled action, filed in my office on the 19th day of

*Arizona Mutual Savings & Loan Assn. et al.* 75

July, 1913, and that the same is a true copy of the original and of the whole thereof.

Witness my hand and the seal of said Court this 19th day of July, 1913.

[Court Seal]

WM. E. THOMAS,  
Clerk.

By (Signed) L. D. Oldham,  
Deputy Clerk. [68]

[Endorsements]: No. 53. In the District Court of the United States, for the District of Arizona. Charles W. Clark, Complainant, vs. Arizona Mutual Savings and Loan Association, and Arizona Trust Company, Defendants. Intervening Petition of Farmers and Merchants' Bank, Phoenix. Filed July 29, 1913, at — M. Allan B. Jaynes, Clerk. By Frank E. McCrary, Deputy. Paul Renau Ingles, Solicitor for Petitioner, Fleming Building, Phoenix, Arizona. [69]

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*In the District Court of the United States, District  
of Arizona.*

CHARLES W. CLARK,

Complainant,

vs.

ARIZONA MUTUAL SAVINGS & LOAN ASSO-  
CIATION and ARIZONA TRUST COM-  
PANY,

Defendants.



**Motion of Farmers and Merchants' Bank, Phoenix,  
Intervener, [to Extend Receivership (Filed  
July 29, 1913)].**

Now comes the Farmers & Merchants' Bank of Phoenix, the intervener above named, and moves the Court to extend the receivership now existing in the above-entitled cause, under and by virtue of the final decree therein of February 27th, 1913, to the judgment heretofore on or about July 12th, 1913, obtained by said intervener in the Superior Court of Arizona, in the County of Maricopa, amounting to Eighteen Thousand Five Hundred (\$18,500) Dollars with interest, in a cause then pending in said court, wherein the said Farmers & Merchants' Bank of Phoenix was plaintiff, and the said Arizona Trust Company, was defendant, for the benefit of your said petitioner, and for the benefit of all other creditors of the defendant Trust Company similarly situated, and for the appointment of a Master to take proof of claims against the said defendant Trust Company, and for such other and further relief as the Court may deem proper. [70]

And notice is hereby given that said motion will be brought on for hearing before the Honorable William W. Morrow, Judge of the Circuit Court of Appeals, sitting at San Francisco, California, in the Federal building, in said city, on August 4th, 1913, at 10:00 o'clock on said day, or as soon thereafter as

counsel may be heard.

Yours, etc.

PAUL R. INGLES,

Solicitor for Farmers & Merchants' Bank, Intervener, Fleming Building, Phoenix, Arizona.

To Sims Ely, Esq., Receiver for the Defendant Arizona Mutual Savings & Loan Association, and Arizona Trust Company.

To Arizona Trust Company.

To William M. Seabury, Solicitor for Interveners Named in Final Decree:

[Endorsements]: Copy Received July 29, 1913. W. M. Seabury, Solicitor for Interveners Named in Final Decree, Sims Ely, Receiver. No 53. In the United States District Court, District of Arizona. Charles W. Clark, Plaintiff, vs. Arizona Mutual Savings & Loan Association, and Arizona Trust Company, Defendants. Motion of Farmers and Merchants' Bank, Interveners, and Notice. Filed July 29, 1913. Allan B. Jaynes, Clerk. By Frank E. McCrary, Deputy. Paul Renau Ingles, Attorney for Farmers & Merchants' Bank, Phoenix, Fleming Block, Phoenix, Arizona. [71]

*In the District Court of the United States, District  
of Arizona.*

CHARLES W. CLARK,

Complainant,

vs.

ARIZONA MUTUAL SAVINGS AND LOAN  
ASSOCIATION and ARIZONA TRUST  
COMPANY,

Defendants.

**Motion of Farmers and Merchants' Bank, Phoenix,  
Intervener, [to Extend Receivership (Filed  
September 17, 1913)].**

Now comes Farmers and Merchants' Bank, Phoenix, the intervener above named, and upon its intervening petition and motion heretofore filed in this court on July 29, 1913, renews its said motion, moving the Court to extend the receivership now existing in the above-entitled cause, under and by virtue of the final decree therein of February 27, 1913, and the judgment heretofore on or about July 12, 1913, obtained by said intervener in the Superior Court of Arizona, in the County of Maricopa, amounting to Eighteen Thousand Five Hundred (\$17,500.00) Dollars, with interest, in a cause then pending in said Court, wherein the said Farmers and Merchants' Bank, Phoenix, was plaintiff, and the said Arizona Trust Company, was defendant, for the benefit of your said petitioner, and for the benefit of all other creditors of the defendant Trust Company similarly situated and for the appointment of a master to take

proof of claims against the said defendant Trust Company, and for such other and further relief as the Court may deem proper.

And notice is hereby given that said motion will be brought on for hearing before the Honorable William H. Sawtelle, Judge of the District Court of the United States, District of Arizona, sitting at Phoenix, Arizona, in the [72] Federal Building in said city, on September 15, 1913, at ten o'clock on said day or as soon thereafter as counsel may be heard.

Yours, etc.,

PAUL RENAU INGLES,

Solicitor for Farmers and Merchants' Bank, Phoenix, Intervener, Fleming Building, Phoenix, Arizona.

To Sims Ely, Esq., Receiver for the Defendant, Arizona Mutual Savings & Loan Association, and Arizona Trust Company;

Copy recd. 9/9-13. C. M. Gandy, Atty. for Receiver.

To Arizona Trust Company.

To William M. Seabury, Solicitor for Interveners  
Named in Final Decree:

Copy received Sept. 9th, 1913. W. M. Seabury, Atty. for Interveners named in decree. [73]

[Endorsements]: No. 53. In the District Court of the United States, District of Arizona. Charles W. Clark, Complainant, vs. Arizona Mutual Savings and Loan Association, and Arizona Trust Company, Defendants. Motion of Farmers and Merchants' Bank, Phoenix, Intervener. Filed Sept. 17, 1913,



80 *Farmers and Merchants' Bank, Phoenix, vs.*

at — M. Allan B. Jaynes, Clerk. By Frank E. McCrary, Deputy. [74]

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**[Order of Submission of Petition of Creditors to  
Intervene and Set Aside Judgment.]**

*In the United States District Court for the District  
of Arizona.*

MINUTE ENTRY MADE ON THURSDAY,  
SEPTEMBER 18, 1913.

No. 53.

CHARLES W. CLARK,

Plaintiff,

vs.

ARIZONA SAVINGS AND INVESTMENT COM-  
PANY et al.,

Defendants.

This matter came on this day regularly to be heard upon the petition of creditors to intervene and set aside the judgment of the Court herein, Benton Dick, Esq., and J. E. Morrison, Esq., appearing as counsel for the petitioners, Wm. M. Seabury, Esquire, for the interveners named in the decree, and C. M. Gandy, Esq., for the receiver. Argument of the respective counsel was had and the matter being fully submitted to the Court, the same was by the Court taken under advisement, the petitioners to have one week in which to file briefs and the respondents one week thereafter in which to reply thereto. [75]

**[Order of Submission of Motion to Extend  
Receivership.]**

*In the United States District Court for the District  
of Arizona.*

MINUTE ENTRY MADE ON THURSDAY,  
SEPTEMBER 18, 1913.

No. 53.

CHARLES W. CLARK,

Plaintiff,

vs.

ARIZONA SAVINGS AND INVESTMENT COM-  
PANY et al.,

Defendants.

This matter came on this day regularly to be heard upon the motion of the Farmers and Merchants' Bank to extend the receivership herein, Paul Renau Ingles, Esq., appearing for said bank, Wm. M. Seabury, Esq., for the interveners named in the decree, and C. M. Gandy, Esq., for the Receiver. Argument of the respective counsel was had and the matter being fully submitted to the Court, the same was by the Court taken under advisement, the said bank to have one week in which to file a brief and the interveners to have one week thereafter in which to file a reply brief. [76]

**[Order Making Partial Allowance of \$1,000 to  
Receiver for Services, etc.]**

*In the United States District Court for the District  
of Arizona.*

MINUTE ENTRY MADE ON SATURDAY,  
OCTOBER 4th, 1913.

No. 53.

CHAS. W. CLARK,

vs.

ARIZONA MUTUAL SERVICE & LOAN ASSO-  
CIATION et al.

Sims Ely, Esq., the Receiver heretofore appointed by the Court in this cause, having heretofore made application for an allowance for Two Thousand Two Hundred Fifty Dollars (\$2,250.00), to be paid to himself for his services as Receiver of the Court herein, and for an allowance for Seven Hundred Fifty Dollars (\$750.00) to be paid to C. M. Gandy, Esq., the attorney for the Receiver, for his services as such; and Willlam M. Seabury, Esq., attorney for the Interveners named in the Decree of the Court, and Paul R. Ingles, Esq., attorney for the Farmers' and Merchants' Bank, and Benton Dick, Esq., attorney for the petitioners named in the petition filed July 29th, 1913, being present in open court at the hearing, and the said matter coming on *regular* this day to be heard by the Court, and the testimony of witnesses offered by the Receiver in support of his said application having been heard and materially con-

sidered by the Court, and no objections having been made by any of the parties in interest herein to the allowance prayed for in his application, [77]

IT IS ORDERED, that a partial allowance of One Thousand Dollars (\$1,000.00), be, and the same is hereby made to the said Receiver for his said services as such; the same to be paid by him out of the Receivership funds now in his hands and to be allowed to the receiver as a credit in the settlement of his final accounts as Receiver; and

IT IS FURTHER ORDERED that the said Receiver pay, and he is hereby authorized to pay to C. M. Gandy, Esq., the sum of Five Hundred Fifty Dollars (\$550.00), in cash, out of the funds now in the hands of the Receiver as such, the said sum to be in addition to the sum of Two Hundred Dollars (\$200.00) heretofore paid by the Receiver to said attorney, thereby making a total of Seven Hundred Fifty Dollars (\$750.00), to be in full and complete satisfaction of all claims of the said attorney for his services as attorney for the Receiver up to the date of this order; and

IT IS FURTHER ORDERED, that the said sum of Seven Hundred Fifty Dollars (\$750.00), when paid as aforesaid, shall be allowed to the said Receiver as a credit in the final settlement of his account as such. [78]



**[Order Continuing Hearing on Motion to Require  
Receiver to Perform Terms of Decree Until  
Other Submitted Matters be Disposed of.]**

*In the United States District Court for the District  
of Arizona.*

MINUTE ENTRY MADE ON MONDAY, OCTO-  
BER 6th, 1913.

No. 53.

CHARLES W. CLARK,

Plaintiff,

vs.

ARIZONA MUTUAL SAVINGS & LOAN ASSO-  
CIATION et al.,

Defendants.

IT IS ORDERED that the hearing on the motion of the interveners named in the decree of September 27th, 1913, to require the Receiver to perform the terms of the Decree, be and the same is hereby continued until the other matters heretofore submitted to the Court shall have been disposed of. [79]

**[Order Directing Entry of Appearance of Stoneman  
& Ling as Attorneys for Receiver.]**

*In the United States District Court for the District  
of Arizona.*

MINUTE ENTRY MADE ON TUESDAY, OCTO-  
BER 14, 1913.

No. 53.

CHARLES W. CLARK,

Complainant,

vs.

ARIZONA MUTUAL SAVINGS & LOAN ASSO-  
CIATION et al.,

Defendants.

Upon motion of George J. Stoneman, Esq., IT IS  
ORDERED that the names of Stoneman & Ling,  
attorneys at law, practicing in this court, be entered  
as attorneys for the receiver in this cause. [80]

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**[Order Setting Case for Argument on January 10,  
1914.]**

*In the United States District Court for the District  
of Arizona.*

MINUTE ENTRY MADE ON SATURDAY,  
DECEMBER 20, 1913.

No. 53.

CHARLES CLARK,

Complainant,

vs.

86 *Farmers and Merchants' Bank, Phoenix, vs.*

ARIZONA MUTUAL LOAN AND SAVINGS  
COMPANY,

Defendant.

IT IS ORDERED that this case be set for argument on January 10th, 1914. [81]

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**[Order Authorizing Receiver to Pay Bill of I. W.  
Wallace for Taxes and Repairs.]**

*In the United States District Court for the District  
of Arizona.*

MINUTE ENTRY MADE ON SATURDAY,  
DECEMBER 20th, 1913.

No. 53.

CHARLES CLARK,

Complainant,

vs.

ARIZONA MUTUAL LOAN AND SAVINGS  
COMPANY,

Defendant.

IT IS ORDERED that the receiver herein be and he is hereby authorized to pay the bill of I. W. Wallace for taxes and repairs amounting to \$300.09, expended by him upon the property of the defendant, providing that said bill be first approved by George D. Christy, who was receiver herein at the time said expenditure was made. [82]

**[Order on Hearing as to Question of Jurisdiction.]**  
*In the United States District Court for the District  
of Arizona.*

MINUTE ENTRY MADE ON SATURDAY,  
JANUARY 10, 1914.

No. 53.

CHARLES W. CLARK,

Plaintiff,

vs.

ARIZONA MUTUAL SAVINGS AND LOAN AS-  
SOCIATION et al.,

Defendants.

This day came the parties by their attorneys and the question as to the jurisdiction of the Court to make the decree of February 27th, 1913, was argued by counsel but not completed, and it is ordered that the said argument be resumed on January 12th, 1914, at three o'clock P. M. [83]

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**[Order Continuing Hearing on Question of  
Jurisdiction.]**

*In the United States District Court for the District  
of Arizona.*

MINUTE ENTRY MADE ON MONDAY,  
JANUARY 12, 1914.

No. 53.

CHARLES W. CLARK,

Plaintiff,

vs.



ARIZONA MUTUAL SAVINGS & LOAN ASSO-  
CIATION,

Defendant.

The argument commenced in this case on January 10th, 1914, and continued until to-day, was this day resumed, and the Court having requested George J. Stoneman, Esquire, counsel for the receiver herein, to present to the Court his views on the law question now before the Court. Objection was made to the argument of the case by Mr. Stoneman by William M. Seabury, Esquire, counsel for the interveners named in the decrees of February 27th, 1913, and the Court thereupon overruled said objection, to which ruling and order of the Court, the counsel for said interveners excepted and asked that his exception be noted upon the record, which was accordingly done, and thereupon the said matters were argued by George J. Stoneman, Esquire, and the reply of Wm. M. Seabury, Esquire, not having been completed, the further hearing of the argument herein was ordered to be continued until a future day of this term, when counsel will be notified by the Court of the time for hearing same. [84]

**[Order of Submission of Question of Jurisdiction.]**  
*In the United States District Court for the District  
of Arizona.*

MINUTE ENTRY MADE ON THURSDAY,  
JANUARY 15, 1914.

No. E-53.

THOMAS P. CLARK,

Plaintiff,

vs.

ARIZONA MUTUAL LOAN & SAVINGS ASSO-  
CIATION,

Defendant.

The argument begun herein on January 10th, and continued on January 12th, and not completed, was this day completed and the matter thereon enjoined was taken under advisement by the Court until a future day of this term. [85]

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**[Order Setting Motion of William L. Rosa for Leave  
to Intervene, etc., for Hearing.]**

*In the United States District Court for the District  
of Arizona.*

MINUTE ENTRY MADE ON SATURDAY,  
JANUARY 24, 1914.

No. 53.

CHARLES W. CLARK,

Complainant,

vs.

ARIZONA MUTUAL SAVINGS AND LOAN AS-  
SOCIATION et al.,

Defendants.

William L. Rosa, having given notice to parties in interest in this cause that he would on Saturday, the 24th day of January, 1914, thereupon move, or as soon thereafter as could be heard, move the Court for an order allowing him to intervene in this cause and an order requiring the parties named in the petition to answer within a time to be fixed by the Court; and he, having filed in this Court notice of his said motion, IT IS ORDERED that the said matter be set down for hearing at a future day of this term, to be hereafter fixed by the Court. [86]

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[Order of Submission of Application of William L.  
Rosa for Leave to Intervene.]

*In the United States District Court for the District  
of Arizona.*

MINUTE ENTRY MADE ON THURSDAY,  
JANUARY 29th, 1914.

No. 53.

CHAS. W. CLARK,

Plaintiff,

vs.

ARIZONA MUTUAL LOAN AND SAVINGS  
ASSOCIATION,

Defendant.

The application of William L. Rosa for leave to intervene herein, was this day argued in his behalf by F. C. Struckmeyer, Esquire, and on behalf of the

interveners named in the decree of February 27th, 1913, by William M. Seabury, Esquire, and same submitted to the Court for its decision and judgment, and the Court thereupon takes the same under advisement. [87]

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**[Order Allowing Sims Ely Further Sum for Services  
as Receiver.]**

*In the United States District Court for the District  
of Arizona.*

MINUTE ENTRY MADE ON THURSDAY,  
JANUARY 29, 1914.

No. 53.

CHAS. W. CLARK,

Plaintiff,

vs.

ARIZONA MUTUAL LOAN AND SAVINGS  
ASSOCIATION,

Defendant.

IT IS ORDERED that Sims Ely be allowed the further sum of Five Hundred Dollars (\$500.00) on account of his services as receiver herein. [88]

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*In the District Court of the United States for the  
District of Arizona.*

IN EQUITY—No. 53.

CHARLES W. CLARK,

Complainant,

vs.



THE ARIZONA MUTUAL SAVINGS AND  
LOAN ASSOCIATION and THE ARI-  
ZONA TRUST COMPANY,

Defendants.

**Decree [March 12, 1914].**

The bill in this cause was filed by a stockholder of the Arizona Mutual Savings and Loan Association on behalf of himself and all other stockholders who might desire to come in and join in the suit. Its fundamental equity is the wrongful transfer of assets of the Loan Association to the Trust Company and the fundamental relief prayed for is the restitution of the assets of the Loan Association to that corporation, or to the receiver of that corporation, to be distributed to its stockholders on its dissolution by order of the Court.

The answers of both the Loan Association and Trust Company show the circumstances of the transfer of the assets of the Loan Association were clearly and plainly illegal and fraudulent and without effect to legally transfer these assets and clearly establish the right of the Loan Association to a full restitution.

The various intervening petitions filed prior to the decree in this cause contain in each a prayer "that the transactions therein set forth as made between the said Loan Association and the said Trust Company may be declared to be annulled and of no force and effect, and that a restitution of all the assets of the defendant Loan Association from the defendant Trust Company be adjudged and decreed; that an accounting between both [89] of the de-

pendants above named be had and taken; that the Court appoint a Master to take proof of the facts alleged in the bill and to determine the rights and equities of all the parties concerned herein, and that the effects of the Loan Association be wound up, its assets marshalled as aforesaid and distributed to those found to be entitled thereto." In neither the original bill nor in any intervening petition is there any prayer for a confirmation of the title of the Trust Company or that the Court should vest the title of the property in that company.

In all the pleadings the relief sought is based on the legal and equitable rights of the Loan Association to have a complete restitution of its assets and to have its assets marshalled and distributed to those found to be entitled thereto.

It is too clear to admit of argument that the assets of the insolvent corporation after the payment of its just debts are to be distributed equally amongst its stockholders and that the Court has no warrant of law to make any other disposition of them as between the stockholders. There is no order in this case giving notice to the stockholders to present their claims to the assets of the company or to show their interest in its property.

The decree entered herein on the 27th day of February, A. D. 1913, without such notice and opportunity being afforded and without referring the case to a Master, as prayed in the bill, to determine the rights and equities of all parties concerned, is that said stockholders mentioned in the decree shall receive all they have paid in, not their proportionate

share of the assets of the Loan Association and by this means these particular stockholders are relieved of all participation in any losses of the Loan Association and are given a lien upon said assets to the exclusion of other stockholders. [90]

It is fundamental that where a judgment or decree has been made which is responsive to the pleadings and in the due course of the lawful jurisdiction of the Court, such decree is beyond the power of the Court to modify or change after the adjournment of the term at which it is rendered, but it does not follow that because this is so that the Court may not set aside or modify a judgment which is not of such a character. In order to render the judgment or decree a finality, the emphatic requirement is that it must be responsive to the matters litigated, and in consonance with the legal relief to which the facts averred show the parties to be entitled.

The question is, has the Court jurisdiction to the extent claimed, and to constitute this there are four essentials:

First: The Court must have cognizance of the class of cases to which the one adjudged belongs.

Second: The proper parties must be present.

Third: The point decided must be in *substance and effect* within the issues.

Fourth: The Court must have proceeded after having acquired jurisdiction of the case "according to established modes governing the class to which the case belongs."

A Court must not go outside of its appointed sphere and it is impossible to concede that because

A. and B. are parties to a suit, that the Court has the right or power to decide or determine any matter in which they are interested whether the matter is involved in the pending litigation or not. A judgment on the matter outside the issues is of necessity altogether unjust because it concludes a point upon which the parties have not been heard. In order to make a judgment conclusive not only the proper parties must be present, but the Court must act on the property according to the rights which [91] appear on the record.

It is the opinion of the Court that the decree of February 27th. 1913, which attempts to vest the title of the assets of the Loan Association in the Trust Company is beyond the issues of the case made by the bill and answers and intervening petitions, it being shown by the pleadings that the Loan Association was insolvent when it did so and that it received no legal consideration for such transfer.

I am likewise of the opinion that the Court exceeded its powers on the pleadings and proof before it when it gave a lien to the intervening creditors on the assets of the Loan Association in the hands of the Trust Company for the amount they had paid in and compelled the parties who were interested in the assets of the Loan Association to bear all the losses incurred by the Loan Association in the conduct of its business.

**IT IS THEREFORE ORDERED** that the decree of the 27th day of February, A. D. 1913, be and the same is hereby modified as follows:

**IT IS ORDERED** that all the properties and



assets of every kind and description which were transferred to the Trust Company by the Loan Association, be restored to the said Loan Association, or the receiver for said Loan Association, and that all contracts, conveyances or agreements which were entered into by the said Loan Association or its agents or officers, be and the same are hereby set aside, vacated and annulled.

IT IS FURTHER ORDERED that the Trust Company transfer and deliver to the receiver in this cause, all property of every kind received by it, its officers or agents, from or on account of the transfer of the said assets of the said Loan Association [92] or received by it from the use and investment or other disposition of any moneys or other property of the said Loan Association.

IT IS FURTHER ORDERED that this cause be referred to Edwin F. Jones, Standing Master of this Court, to state the account between the Loan Association and the Trust Company and to that end he shall hear testimony and may examine and inspect all papers on file in this Court or in the hands or possession of the receiver in this cause.

IT IS FURTHER ORDERED that the said Standing Master ascertain and report the exact amount due by said Loan Association to each of its stockholders, and in order to do so he is directed to publish a notice in some newspaper in the City of Phoenix for at least five times, requiring all persons claiming to be stockholders in said Loan Association to file their claim, with proof thereof, with him within thirty (30) days from the first publication of

such notice, and that he send by mail to each of the stockholders of said Loan Association a copy of such notice.

IT IS FURTHER ORDERED that the said Standing Master report on the priorities or equities of all persons claiming to be interested in the property of the said Loan Association and the order in which same are to be paid out of the assets of the said Loan Association.

IT IS FURTHER ORDERED that the Master report what are the rights of said Loan Association in any assets now in the hands of persons not parties to this suit and whether or not same can be recovered from the parties to whom they were transferred.

IT IS FURTHER ORDERED that the Master ascertain and report what sum of money or other assets of the said Loan Association were unlawfully used by any officer or agent of either the Loan Association or Trust Company, and whether same or any part thereof can be recovered from said parties or their transferees. [93]

IT IS FURTHER ORDERED that the demurrers to the petitions now on file seeking intervention, be and the same are overruled and that the petitioning parties mentioned in the petition of July 15th, 1913, be allowed to intervene in this cause and present their claims to the Master for adjudication in accordance with this decree.

IT IS FURTHER ORDERED that Sims Ely, the receiver in this cause, be appointed general receiver herein, with all proper powers and that he hold all of the assets and property now in his hands belonging

98 *Farmers and Merchants' Bank, Phoenix, vs.*

to either of said corporations until the further order of this Court.

All other questions are reserved until the coming in of the report of the Master.

DONE IN OPEN COURT this 12th day of March,  
A. D. 1914.

(Signed) WM. H. SAWTELLE,

Judge. [931½]

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**[Order Denying Motion of Farmers and Merchants'  
Bank, Phoenix, to Extend Receivership, etc.,  
and Dismissing Intervening Petition.]**

*In the District Court of the United States for the  
District of Arizona.*

MINUTE ENTRY MADE ON THURSDAY,  
MARCH 12th, 1914.

FARMERS AND MERCHANTS' BANK,  
PHOENIX, Intervener.

CHARLES W. CLARK,

Complainant,

vs.

ARIZONA MUTUAL SAVINGS AND LOAN  
ASSOCIATION and ARIZONA TRUST  
COMPANY,

Defendants.

Farmers and Merchants' Bank, Phoenix, having filed its intervening petition in the above-entitled cause, and having filed a motion moving the Court to extend the receivership existing in the above-entitled cause under and by virtue of the final decree therein of February 27, 1913, to include the judgment of

Farmers and Merchants' Bank, Phoenix, therein, for the benefit of the said Farmers and Merchants' Bank, Phoenix, and all other creditors of the defendant Trust Company similarly situated, and for the appointment of a master to take proof of claims against the said defendant Trust Company and said matter coming on to be heard before the Court on the 12th day of March, 1914, Paul Renau Ingles appearing for the intervener Farmers and Merchants' Bank, Phoenix, and no one appearing in opposition thereto, said motion is hereby denied; the prayer of the petition in intervention, being No. 4, contained on page 26 of said intervening petition, beginning on line 9 thereof [94] and concluding on line 21 thereof, being the prayer for the issuance of a writ of subpoena of the United States of America issued out of and under the seal of this Honorable Court, directed to A. J. Edwards, W. T. Smith, John T. Dunlap and J. Wesley Walker, is hereby denied and said intervening petition is hereby dismissed. [95]

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**[Order Directing Clerk to Furnish Certified Copy of  
Decree to Receiver and Master.]**

*In the United States District Court for the District  
of Arizona.*

MINUTE ENTRY MADE ON THURSDAY,  
MARCH 12th, 1914.

No. 53.

CHARLES W. CLARK,

Complainant,

vs.



100 *Farmers and Merchants' Bank, Phoenix, vs.*

ARIZONA MUTUAL SAVINGS AND LOAN  
ASSOCIATION and ARIZONA TRUST  
COMPANY,

Defendants.

IT IS ORDERED that a copy of the decree this day entered herein by this Court, certified to under the hand of the Clerk and the seal of the Court, be furnished by the Clerk to the Receiver and Master herein. [96]

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*In the United States District Court for the District  
of Arizona.*

MINUTE ENTRY MADE ON THURSDAY,  
MARCH 26th, 1914.

No. 53.

CHARLES W. CLARK,

Complainant,

vs.

ARIZONA MUTUAL SAVINGS & LOAN ASSO-  
CIATION and ARIZONA TRUST COM-  
PANY,

Defendants.

**Order [Denying Petition for Appeal from Order of  
March 12, 1914, etc.].**

On reading the petition of the Farmers & Merchants' Bank praying an appeal from the order of the Court made and entered herein on March 12th, 1914, denying the said petition of the Farmers & Merchants' Bank for leave to intervene herein and dismissing the said petition, and also from the decree

made herein by this Court on March 12th, 1914. in the original cause,

IT IS ORDERED that the prayer of said petitioner for an appeal, be and the same is hereby denied, upon the ground that the said Farmers & Merchants' Bank not being a party of the original cause can have no right of appeal from any order or decree made in said cause.

IT IS FURTHER ORDERED that said petitioner is entitled to appeal from the order made herein on March 12th, 1914, denying its right to intervene and dismissing its petition, and upon presentation of the proper petition the appeal will be granted upon giving bond conditioned as required by law.

Dated this 26th day of March, A. D. 1914.

WM. H. SAWTELLE,

Judge of the District Court of the United States for the District of Arizona. [97]

[Endorsements]: No. 53. In the District Court of the United States for the District of Arizona. Charles W. Clark, Complainant, vs. Arizona Mutual Savings & Loan Association and Arizona Trust Company, Defendants. Order. Filed Mch. 27, 1914. Geo. W. Lewis, Clerk. By R. E. L. Webb, Deputy. [98]

[Affidavit of Paul Renau Ingles.]

*In the District Court of the United States, for the  
District of Arizona.*

CHARLES W. CLARK,

Complainant,

vs.

ARIZONA MUTUAL SAVINGS AND LOAN  
ASSOCIATION and ARIZONA TRUST  
COMPANY,

Defendants.

State of Arizona,

County of Maricopa,—ss.

PAUL RENAU INGLES, being duly sworn, says:

I am a solicitor of this Court and the solicitor for the Farmers and Merchants' Bank, Phoenix, the petitioner herein;

On or about July 29, 1913, the said Farmers and Merchants' Bank, Phoenix, as a judgment creditor of the defendant Trust Company, filed its petition in intervention in the above-entitled cause, praying in substance that the receivership then existing over the properties and assets of the defendant Trust Company be extended to the judgment of the said Farmers and Merchants' Bank, Phoenix, obtained in the Superior Court of the State of Arizona, in and for Maricopa County, not only for the benefit of said Farmers and Merchants' Bank, Phoenix, but for the benefit of all other judgment creditors and for the benefit of all having claims of any kind or character

against the defendant Trust Company; praying further that a master be appointed before whom all claimants might present their claims against the defendant Trust Company, and that notice be sent [99] to all claimants against said Trust Company and that the assets be marshalled and the affairs of the said Trust Company wound up and finally settled; further praying for issuance of process against A. J. Edwards, W. T. Smith, John T. Dunlap and J. Wesley Walker; further praying that the said Edwards, Smith, Dunlap and Walker make an accounting; and for general relief.

At said time there was in existence in said cause a final decree dated and entered February 27, 1913, directing the receiver therein appointed to pay to the persons therein named the sums therein specified, and to pay the surplus thereafter remaining, if any, to the defendant Trust Company.

I am informed and verily believe that there will be a surplus in the receiver's hands if he is permitted to perform the terms of the decree of February 27, 1913; and on behalf of the said Farmers and Merchants' Bank, Phoenix, I assert that said bank acquired and has a vested property right in the surplus moneys of said Trust Company under the decree of February 27, 1913, for the reasons set out in said intervening petition.

On March 12, 1914, the Court below entered an order dismissing the petition of the said Farmers and Merchants' Bank, Phoenix, denying it leave to intervene in said cause as to said surplus, and, notwithstanding the fact that the term at which the



final decree of February 27, 1913, was entered, expired on April 5, 1913, by reason of which the court had no jurisdiction in the premises, the Court on March 12, 1914, made and entered another and wholly different decree in said cause, which among other things reopened the above-entitled cause and deprived the Farmers and Merchants' Bank, Phoenix, of its vested rights in the surplus moneys inuring to the defendant Trust Company under the decree of February 27, 1913, by the following provision: "It is further ordered that the Trust Company transfer and deliver to the receiver in this cause all property of every kind [100] received by it, its officers or agents from or on account of the transfer of the said assets of the said Loan Association or received by it from the use and investment or other disposition of any moneys or other property of the said Loan Association"; all to the great prejudice of the Farmers and Merchants' Bank, Phoenix.

The said Farmers and Merchants' Bank, Phoenix, claiming to have been a party to the record of said cause since the filing of its petition in intervention therein on July 29, 1913, notwithstanding the denial of its application to intervene, and feeling itself aggrieved both by the order of dismissal and by the decree of March 12, 1914, for the reasons stated, desired to review the said order and said decree in the Circuit Court of Appeals for this circuit, and to that end on March 24, 1914, filed a notice of appeal and submitted to the Honorable District Judge of this district the appeal papers, copies of which are hereto annexed, for allowance, but on or about March

26, 1914, the Court entered the order a certified copy of which is hereto annexed, denying the application of the Farmers and Merchants' Bank, Phoenix, for leave to appeal as therein stated.

WHEREFORE, pursuant to the authority conferred upon the Judge of the Circuit Court of Appeals under Section 132, Judicial Code, the Farmers and Merchants' Bank, Phoenix, prays that an appeal be allowed both from the decree of March 12, 1913, and the order of said date, and that the bond on said appeal be fixed accordingly.

PAUL RENAU INGLES.

Subscribed and sworn to before me, this 28th day of March, A. D. 1914.

[Notarial Seal]

B. L. RUDDEROW,  
Notary Public.

(My commission expires Sept. 26, 1916.) [101]

*In the United States District Court for the District  
of Arizona.*

No. 53.

CHARLES W. CLARK,

Complainant,

vs.

ARIZONA MUTUAL SAVINGS AND LOAN  
ASSOCIATION and ARIZONA TRUST  
COMPANY,

Defendants.

### ORDER.

On reading the petition of the Farmers & Merchants' Bank praying an appeal from the order of the Court made and entered herein on March 12th,

1914, denying the said petition of the Farmers & Merchants' Bank for leave to intervene herein and dismissing the said petition, and also from the decree made herein by this Court on March 12th, 1914, in the original cause,

IT IS ORDERED that the prayer of said petitioner for an appeal, be and the same is hereby denied, upon the ground that the said Farmers & Merchants' Bank not being a party of the original cause can have no right of appeal from any order or decree made in said cause.

IT IS FURTHER ORDERED that said petitioner is entitled to appeal from the order made herein on March 12th, 1914, denying its right to intervene and dismissing its petition, and upon presentation of the proper petition the appeal will be granted upon giving bond conditioned as required by law.

Dated this 26th day of March, A. D. 1914.

WM. H. SAWTELLE,

Judge of the District Court of the United States for  
the District of Arizona. [102]

United States of America,  
District of Arizona,—ss.

I, George W. Lewis, Clerk of the United States District Court for the District of Arizona, do hereby certify that the above and foregoing is a true, perfect and complete copy of an order of Court made Mch. 26, 1914, as the same appears from the original records of the same remaining in my office.

WITNESS my hand and the seal of said Court  
affixed this 28th day of March, 1914.

[Seal of the Court]

GEO. W. LEWIS.

Clerk.

By R. E. L. Webb,

Deputy Clerk. [103]

[Endorsements]: No. E-53. In the District Court  
of the United States, for the District of Arizona.  
Charles W. Clark, Complainant, vs. Arizona Mutual  
Savings and Loan Association and Arizona Trust  
Company, Defendants. Affidavit. Filed Apr. 15,  
1914. Geo. W. Lewis, Clerk. By R. E. L. Webb,  
Deputy. [115]

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*In the District Court of the United States for the  
District of Arizona.*

CHARLES W. CLARK,

Complainant,

vs.

ARIZONA MUTUAL SAVINGS AND LOAN  
ASSOCIATION and ARIZONA TRUST  
COMPANY,

Defendants.

### **Notice of Appeal.**

The Farmers and Merchants' Bank, Phoenix, hav-  
ing filed its intervening petition in the above-entitled  
cause on or about July 29, 1913, and having on or  
about said day duly moved this Court for leave to  
intervene in said cause, and for the other relief  
prayed for in said motion, and said Court having, on  
or about March 12, 1914, denied said relief and en-



tered an order herein as of said date dismissing the said petition of the said Farmers and Merchants' Bank, Phoenix, as aforesaid;

Now, therefore, comes the said Farmers and Merchants' Bank, Phoenix, and hereby appeals from the said order of March 12, 1914, so made and entered as aforesaid, and also appeals from the final decree, so-called, entered in the above-entitled cause on or about March 12, 1914, which said decree purports, among other things, to annul, vacate and set aside the final decree entered in the above-entitled cause on February 27, 1913, and the said Farmers and Merchants' Bank, Phoenix, hereby appeals, and gives notice thereof, from each and every part of the said final decree of March 12, 1914, and the said order of March 12, 1914, so described as aforesaid, to the Circuit Court of Appeals in and for the Ninth Circuit.

Dated at Phoenix, Arizona, this 24th day of March, 1914.

PAUL RENAU INGLES,

Solicitor for the Farmers and Merchants' Bank,  
Phoenix, Fleming Building, Phoenix, Arizona.

[104]

[Endorsements]: No. 53. In the District Court of the United States for the District of Arizona. Charles W. Clark, Complainant, vs. Arizona Mutual Savings and Loan Association and Arizona Trust Company, Defendants. Notice of Appeal. Filed Mar. 24, 1914, at — M. George W. Lewis, Clerk. By Robert E. L. Webb, Deputy. [105]

*In the District Court of the United States, for the  
District of Arizona.*

CHARLES W. CLARK,

Complainant,

vs.

ARIZONA MUTUAL SAVINGS AND LOAN  
ASSOCIATION and ARIZONA TRUST  
COMPANY,

Defendants.

**Petition of Farmers and Merchants' Bank, Phoenix,  
for an Order Allowing It to Appeal from the  
Order of March 12, 1914, and from the Decree  
Entered Herein on March 12, 1914.**

To the Honorable WILLIAM H. SAWTELLE,  
Judge of the District Court in and for the Dis-  
trict of Arizona.

The above-named Farmers and Merchants' Bank, Phoenix, petitioner herein, feeling itself aggrieved by the order of this Honorable Court made and entered herein on March 12, 1914, whereby the said Court dismissed the petition of the said Farmers and Merchants' Bank, Phoenix, for leave to intervene in the said cause, for an order extending the receivership then and now existing over the defendant Trust Company above named to the judgment of the said Farmers and Merchants' Bank, Phoenix, heretofore recovered as set out in its intervening petition, and denying to the said Farmers and Merchants' Bank, Phoenix, the process of this Honorable Court against the persons named in said petition, and feeling itself

aggrieved by the decree entered in the above-entitled cause in this Honorable Court on March 12, 1914, which said decree purported to vacate, annul and set aside the final decree herein entered and enrolled on the 27th day of February, 1913, does hereby appeal from said order of March 12, 1914, and from said decree of March 12, 1914, and each and every part of each said order and said decree to the Circuit Court of Appeals in and for the Ninth Judicial Circuit [106] for the reasons specified in the assignment of errors which is filed herein; and your petitioner prays that its appeal be allowed and that such citation issue as is provided by law, and that a transcript of the records, proceedings and papers upon which said decree of March 12, 1914, and said order of March 12, 1914, was based, duly authenticated, may be sent to the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, sitting at the city of San Francisco, State of California; and your petitioner further prays that the proper order touching the security required of it to perfect its said appeal herein be made.

PAUL RENAU INGLES,

Solicitor for the Farmers and Merchants' Bank,  
Phoenix, Fleming Building, Phoenix, Arizona.

**[Order Granting Petition and Allowing Appeal.]**

The foregoing petition is granted and the appeal therein prayed allowed upon giving bond in the sum of Five Hundred Dollars, conditioned as required by law and to answer all costs on said appeal.

WM. W. MORROW,

Judge of the United States Circuit Court of Appeals  
for the Ninth Circuit. [107]

[Endorsements]: No. 53. In the District Court of the United States for the District of Arizona. Charles W. Clark, Complainant, vs. Arizona Mutual Savings and Loan Association, and Arizona Trust Company, Defendants. Petition for Appeal and Order Allowing Same. Filed Mar. 24, 1914, at ——— M. George W. Lewis, Clerk. By Robert E. L. Webb, Deputy. [108]

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*In the District Court of the United States, for the  
District of Arizona.*

CHARLES W. CLARK,

Complainant,

vs.

ARIZONA MUTUAL SAVINGS AND LOAN AS-  
SOCIATION and ARIZONA TRUST COM-  
PANY,

Defendants.

### **Assignment of Errors.**

And now on this 24th day of March, 1914, comes the Farmers and Merchants' Bank, Phoenix, as intervener herein, by its solicitor, Paul Renau Ingles, and complains and alleges:

That the decree entered herein in the above-entitled cause on the 12th day of March, 1914, and the order entered in the above-entitled cause dismissing the petition of the said Farmers and Merchants' Bank, Phoenix, and entered on March 12, 1914, are each erroneous and unjust to the said Farmers and Merchants' Bank, Phoenix, and that the learned District Court of the United States in and for the District



of Arizona erred in making said decree and said order respectively in each and all of the following particulars:

# I.

The said Court erred in making and entering the said decree of March 12, 1914, as to your petitioner, Farmers and Merchants' Bank, Phoenix, in that it *assumed exert* and exercise jurisdiction over the final decree entered and enrolled herein on February 27, 1913, after the expiration of the term of said court at which said final decree of February 27, 1913, was duly entered and enrolled, which said time expired on April 5, 1913, and that on March 12, 1914, when the said decree of this Honorable [109] Court was entered herein the said Court was wholly without power and jurisdiction to vacate, modify or annul the said decree of February 27, 1913, for the reasons stated.

# II.

That the learned Court below erred in so vacating the final decree of February 27, 1913, by its said decree of March 12, 1914, because and for the reason that the said Farmers and Merchants' Bank, Phoenix, on or about July 12, 1913, when it recovered its judgment against the defendant Trust Company above named, for the sum of \$18,500, in the Superior Court of the State of Arizona, in and for the County of Maricopa, acquired and became *vested* a property right in and to the surplus moneys remaining after the terms of the said final decree of February 27, 1913, herein described had been duly performed and executed, and that the learned Court below erred,

and had no jurisdiction, right or authority to vacate or modify said decree of February 27, 1913, as against your said petitioner, Farmers and Merchants' Bank, Phoenix, after the expiration of the October Term, 1912, of said District Court at which said decree of February 27, 1913, was *entered expired* on April 5, 1913.

### III.

That the Court further erred as to the said Farmers and Merchants' Bank, Phoenix, in rendering and entering its said decree of March 12, 1914, herein, in that by so doing the learned Court thereby adjudged and determined the rights of minority preferred stockholders in the defendant Trust Company to be superior to the rights of the said Farmers' and Merchants' Bank, Phoenix, as a lawful judgment creditor of the defendant Trust Company in and to the surplus assets of said defendant Trust Company remaining after the performance, satisfaction and discharge of the terms of the said final decree of February 27, 1913. [110]

### IV.

That the learned Court erred in making its order of March 12, 1914, in the above-entitled cause, dismissing the petition of the Farmers and Merchants' Bank, Phoenix, for leave to intervene in said cause in each and all of the following respects and particulars, namely:

A. Because in and by the said order the said learned Court denied to your said petitioner the right to intervene in the said proceeding as to the surplus moneys therein involved after payment of the liens

described in the decree of February 27, 1913, although and notwithstanding the fact that the said Farmers and Merchants' Bank, Phoenix, as a lawful judgment creditor of the defendant Trust Company was lawfully entitled to participate in said surplus moneys; and due to the fact that the said learned Court had in its possession the *res*, i. e., all of the properties then belonging to the defendant Trust Company the said Farmers and Merchants' Bank, Phoenix, was required to apply to the said Court for the protection of its said rights therein, which said rights the said learned Court by its said order declined to protect and dismissed your said Farmers and Merchants' Bank, Phoenix, from said court without any other remedy at law or otherwise for the protection of its said rights.

## V.

That said learned Court further erred in making said order of March 12, 1914, in that it denied to the said Farmers and Merchants' Bank, Phoenix, process against the individuals, A. J. Edwards, W. T. Smith, John T. Dunlap and J. Wesley Walker, to compel the said individuals to respond to the allegations of the said intervening petition to the end that the estate of the defendant Trust Company then in the hands of the receiver of the [111] court below might be increased and enhanced for the benefit of the said Farmers and Merchants' Bank, Phoenix, as a lawful judgment creditor of the defendant Trust Company and others similarly situated.

## VI.

That the learned Court further erred in denying

the application of the said Farmers and Merchants' Bank, Phoenix, to extend the limited receivership then existing over the defendant Trust Company to the judgment of the said Farmers and Merchants' Bank, Phoenix, against the said defendant Arizona Trust Company.

## VII.

That said learned Court further erred in dismissing the petition of the said Farmers and Merchants' Bank, Phoenix, which said petition upon the face thereof disclosed facts sufficient to constitute a cause in equity justifying the intervention of the said Farmers and Merchants' Bank, Phoenix, in the above-entitled cause, as to the surplus moneys remaining after the payment of the liens described in said final decree of February 27, 1913.

## VIII.

Said Court further erred in denying the application of the said Farmers and Merchants' Bank, Phoenix, for leave to intervene in said cause in the exercise of its supposed discretion, but that in reality said Farmers and Merchants' Bank, Phoenix, was and now is entitled to intervene in said cause as a matter of right and that its right of intervention does not depend upon the exercise of discretion of the learned Court below.

Wherefore, the said Farmers and Merchants' Bank, Phoenix, prays that said decree of March 12, 1914, may be directed to be expunged from the records of the court below for want of [112] jurisdiction in said court to grant said decree, and that the learned Court below be directed to reinstate



said decree of February 27, 1913, as the final decree in the above-entitled cause and that the order entered herein by the learned Court below on March 12, 1914, dismissing the petition of the said Farmers and Merchants' Bank, Phoenix, in intervention herein be reversed for the errors herein assigned; and that the learned Court below be directed to allow the said petition to be filed in the above-entitled cause, and process to issue thereon as prayed for therein; and that the learned Court below be instructed to grant the motion of the said Farmers and Merchants' Bank, Phoenix, to extend the said receivership of the said defendant Trust Company to the judgment of the said Farmers and Merchants' Bank, Phoenix, against said defendant Trust Company; and that the said Farmers and Merchants' Bank, Phoenix, have such other relief in the premises as to this Court may seem proper.

PAUL RENAU INGLES,

Solicitor for Farmers and Merchants' Bank, Phoenix, Fleming Building, Phoenix, Arizona.

[Endorsements]: No. 53. In the District Court of the United States for the District of Arizona. Charles W. Clark, Complainant, vs. Arizona Mutual Savings and Loan Association, and Arizona Trust Company, Defendants. Assignment of Errors. [113]

[Endorsements]: No. 53. In the District Court of the United States for the District of Arizona. Charles W. Clark, Complainant, vs. Arizona Mutual Savings and Loan Association, and Arizona Trust Company, Defendants. Assignment of Errors.

Filed Mar. 24, 1914, at — M. George W. Lewis,  
Clerk. By Robert E. L. Webb, Deputy. [114]

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*In the District Court of the United States in and for  
the District of Arizona.*

CHARLES W. CLARK,

Complainant,

vs.

ARIZONA MUTUAL SAVINGS AND LOAN AS-  
SOCIATION and ARIZONA TRUST COM-  
PANY,

Defendants.

FARMERS AND MERCHANTS' BANK, PHOE-  
NIX,

Intervener.

**Praeceptum for Transcript of Record.**

To the Clerk of the United States Court in and for  
the District of Arizona:

You will please prepare a transcript of record in  
the above-entitled cause to be filed in the office of the  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Judicial Circuit upon an appeal to be  
perfected to said court in said cause, including in  
said transcript the following proceedings, pleadings,  
papers, records and files, to wit:

Decree of February 27, 1913.

Petition in intervention and motion filed by Mr.  
Benton Dick on July 15, 1913.

Petition in intervention of Farmers and Merchants'  
Bank, Phoenix, and motion thereon filed July  
29, 1913, together with proof of service thereon.

118 *Farmers and Merchants' Bank, Phoenix, vs.*

Renewal of motion on petition of Farmers and Merchants' Bank, Phoenix.

Decree of March 12, 1914.

Order of March 12, 1914.

All minute entries made since decree of February 27, 1913.

Notice of appeal. [116]

Petition for appeal, together with order allowing same.

Assignment of errors.

Bond on appeal.

Citation.

Praeceptum for transcript.

Certificate of clerk.

(Signed) PAUL RENAU INGLES,  
Solicitor for Farmers and Merchants' Bank, Phoenix, Intervener.

[Endorsements]: E-53. In the District Court of the United States in and for the District of Arizona. Charles W. Clark, Complainant, vs. Arizona Mutual Savings and Loan Association, and Arizona Trust Company, Defendants. Farmers and Merchants' Bank, Phoenix, Intervener. Praeceptum for Transcript of Record. Filed Apr. 22, 1914, at — M. Geo. W. Lewis, Clerk. By R. E. L. Webb, Deputy. [116½]

*In the District Court of the United States, for the  
District of Arizona.*

CHARLES W. CLARK,

Complainant,

vs.

ARIZONA MUTUAL SAVINGS AND LOAN AS-  
SOCIATION and ARIZONA TRUST COM-  
PANY,

Defendants.

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS,  
That we, Farmers and Merchants' Bank, Phoenix, as  
principal, and A. G. Smoot and G. L. Wilky, as sure-  
ties, acknowledge ourselves to be indebted jointly and  
severally to the Arizona Mutual Savings and Loan  
Association and the Arizona Trust Company and  
Sims Ely, Esq., as receiver of each said companies,  
in the sum of Five Hundred and no/100 Dollars, con-  
ditioned that whereas on or about the 12th day of  
March, 1914, in the District Court of the United  
States for the District of Arizona in a suit depending  
in that court, wherein Charles W. Clark was com-  
plainant and the Arizona Mutual Savings and Loan  
Association and the Arizona Trust Company were  
defendants, a certain decree which purported to  
vacate the decree theretofore entered in said cause  
denying the right of the Farmers and Merchants'  
Bank, Phoenix, to intervene in said cause, and dis-



missing the intervening petition of the said Farmers and Merchants' Bank, Phoenix, and the said Farmers and Merchants' Bank, Phoenix, having obtained an appeal to the Circuit Court of Appeals in and for the Ninth Judicial Circuit from said decree and from said order of March 12, 1914, which has been duly filed in the office of the Clerk of the said Court to reverse the said decree and order of March 12, 1914, and a citation directed to the said defendants in said suit and the said Sims Ely as receiver thereof and admonishing him and them to be and appear at a session of the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit to be holden in the city [117] of San Francisco, in the State of California, on the 15th day of May, 1914, next. Now, if the said Farmers and Merchants' Bank, Phoenix, shall prosecute said appeal to effect and answer all costs if it shall fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

And the said bond and obligation is upon the further express condition and agreement by the sureties thereto, that in case of a breach of the condition set forth herein, this Court may upon notice to said sureties of not less than ten days proceed summarily in said action or suit in which this bond is given to ascertain the amount which said sureties are bound to pay on account of such breach of said bond and undertaking and render judgment against the said

sureties and each of them and award execution thereon.

(Signed) FARMERS AND MERCHANTS'  
BANK, PHOENIX,

By J. P. IVY, Pres.

(Signed) A. G. SMOOT.

(Signed) G. L. WILKEY.

Approved as to form and sufficiency of the sureties  
this 15th day of April, 1914.

(Signed) WM. H. SAWTELLE,  
Judge of the District Court of the United States for  
the District of Arizona. [118]

State of Arizona,  
County of Maricopa,—ss.

A. G. Smoot and G. L. Wilky, being duly and severally sworn, each for himself deposes and says: I am one of the sureties upon the above bond and undertaking; I am a resident and freeholder within the District of Arizona and worth the amount specified in such bond and undertaking over and above all my debts and liabilities exclusive of property exempt from execution, and that your deponent makes these statements for the purpose of inducing the parties and the Court to accept him as a surety upon the above bond and undertaking, knowing that said Court and parties rely upon the truth thereof.

(Signed) A. G. SMOOT.

(Signed) G. L. WILKY.

Subscribed and sworn to before me this 15th day of April, 1914.

[Seal of Court]

(Signed) GEORGE W. LEWIS,  
Clerk U. S. District Court, District of Arizona.  
[119]

[Endorsements]: No. 53. In the District Court of the United States for the District of Arizona. Charles W. Clark, Complainant, vs. Arizona Mutual Savings and Loan Association and Arizona Trust Company, Defendants. Bond on Appeal. Filed April 15, 1914. George W. Lewis, Clerk. [120]

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*In the District Court of the United States for the  
District of Arizona.*

IN EQUITY—No. 53.

CHARLES W. CLARK,

Complainant,

vs.

THE ARIZONA MUTUAL SAVINGS AND  
LOAN ASSOCIATION and THE ARI-  
ZONA TRUST COMPANY,

Defendants.

IN THE MATTER OF THE APPLICATION OF  
THE RECEIVER FOR AN ORDER AP-  
PROVING EXECUTION OF CERTAIN  
DEEDS IN CHAMBERS.

**Order [Approving and Confirming Action of  
Receiver in Certain Matters.]**

The petition of Sims Ely, Receiver of the Arizona Mutual Savings and Loan Association and The Ari-

zona Trust Company, for an order confirming his action in executing and delivering to Samuel Itule a quitclaim deed to Lot 1, Block 19, Bisbee Townsite, County of Cochise, State of Arizona, for the sum of Eight Hundred (\$800.00) Dollars, and confirming his action in the execution of a quitclaim deed to portions of Lots No. 31 and No. 32, Block 143, town of Douglas, described as commencing at a point ninety-four (94) feet north from the southeast corner of lot thirty-two (32), and running thence north forty-eight (48) feet to the northeast corner of said lot thirty-two (32); thence west fifty (50) feet; thence south one hundred and forty-two (142) feet; thence east ten (10) feet; thence north ninety-four (94) feet; thence east forty (40) feet to the place of beginning; the same being all of lots thirty-one (31) and thirty-two (32) in block one hundred and forty-three (143) not heretofore conveyed by one F. L. Blumer to one W. H. Harwood, having been presented in Chambers for allowance, from which it appears that the action of said receiver is in all respects necessary and required, and that said petition should be granted; [121]

NOW, THEREFORE, IT IS HEREBY ORDERED that the action of the said receiver in the matters hereinabove mentioned be and the same is hereby approved and confirmed.

Dated at Phoenix, Arizona, April 23d, 1914, in Chambers.

(Signed) WM. H. SAWTELLE,

Judge of the District Court of the United States for the District of Arizona. [122]



*In the District Court of the United States in and for  
the District of Arizona.*

EQUITY—No. 53.

CHARLES W. CLARK,

Complainant,

vs.

THE ARIZONA MUTUAL SAVINGS AND  
LOAN ASSOCIATION. and THE ARI-  
ZONA TRUST COMPANY,

Defendants.

**Order [Authorizing and Directing Sims Ely to Sell  
Certain Lots, etc.].**

The petition of Sims Ely, General Receiver appointed by this Court for each of the defendants above named, having been presented to me in Chambers at Tucson, Arizona, from which it appears that an order should be made permitting the said Sims Ely to execute and deliver a good and sufficient deed to certain property mentioned and set forth in said petition under the terms and conditions and for the price therein set forth,

NOW, THEREFORE, IT IS HEREBY ORDERED that the said Sims Ely is hereby authorized and directed to sell Lots nine (9), ten (10) and eleven (11) in block thirty-six (36) in Musgrave's Addition to the City of Douglas, Arizona, for a sum not less than Eight Hundred (\$800.00) Dollars, and upon such sale to execute and deliver to the purchaser thereof a good and sufficient deed con-

veying title thereto, anything in the decree and order of this Court dated March 12th, 1914, to the contrary notwithstanding.

Dated May 2d, 1914, at Tucson, Arizona, in Chambers.

WM. H. SAWTELLE,

Judge of the United States Court for the District of Arizona. [123]

[Endorsements]: Equity No. 53. In the District Court of the United States in and for the District of Arizona. Charles W. Clark, Complainant, vs. The Arizona Mutual Savings and Loan Association and The Arizona Trust Company, Defendants. Order. Filed May 2, 1914. George W. Lewis, Clerk. Law Offices: Stoneman & Ling, 405, 406 and 407 Goodrich Block, Phoenix, Arizona. [124]

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*In the United States District Court for the District of Arizona.*

No. 53.

CHARLES W. CLARK,

Appellant,

vs.

ARIZONA MUTUAL SAVINGS AND LOAN  
ASSOCIATION and ARIZONA TRUST  
COMPANY,

Appellees.

**Order Under Rule 16, Section 1, Enlarging Time to  
May 25, 1914, to File Record Thereof and to  
Docket Cause.**

On consideration of the application of Mr. George

126 *Farmers and Merchants' Bank, Phoenix, vs.*

W. Lewis, the Clerk of the District Court of the United States for the District of Arizona, and good cause therefor appearing,

IT IS ORDERED that the time within which the original certified Transcript of the Record in the above-entitled cause may be filed, and within which the cause may be docketed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, be, and hereby is enlarged to and including the 25th day of May, A. D. 1914.

WM. H. SAWTELLE,  
Judge of the United States District Court for the District of Arizona.

Dated at Tucson, Arizona, this 12 day of May, A. D. 1914. [125]

[Endorsed]: No. 53 (Phoenix). In the United States District Court for the District of Arizona. Charles W. Clark, Complainant, vs. Arizona Mutual Savings and Loan Association and Arizona Trust Company, Defendants. Order Enlarging Time Within Which to File Certified Transcript of Record. Filed May 13, 1914, at — M. Geo. W. Lewis, Clerk. By R. E. L. Webb, Deputy. [126]

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**[Certificate of Clerk U. S. District Court to  
Transcript of Record.]**

United States of America,  
District of Arizona.—ss.

I, George W. Lewis, Clerk of the United States District Court for the District of Arizona, do hereby

certify that the above and foregoing is a true, perfect and complete copy of the following:

Decree of February 27, 1913;

Petition in Intervention and Motion filed by Benton Dick, Esq., on July 15, 1913;

Petition in Intervention of Farmers and Merchants' Bank, Phoenix, and motion thereon filed July 29, 1913, together with proof of service thereon;

Renewal of Motion on Petition of Farmers and Merchants' Bank, Phoenix;

Decree of March 12, 1914;

Order of March 12, 1914;

All Minute Entries made since Decree February 27, 1913;

Notice of Appeal;

Petition for Appeal, together with order allowing same;

Assignment of Errors;

Bond on Appeal;

Citation;

Praeceptum for Transcript;

—as they appear from the originals thereof, all of which remain on file in my office, except the originals of the Citation and Assignment of Errors, which two last-mentioned papers are hereto annexed;

And I further certify that for the preparation of this transcript, hereto attached, the following charges were made:

Copying 272 folios at 20¢ per folio..\$54.40

Certificate of Clerk, 2 folios at 30¢

per folio..... .60

Seal of Court..... .40

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Total..... 55.40



128 *Farmers and Merchants' Bank, Phoenix, vs.*

—and that the said sum of Fifty-five and 40/100 Dollars was paid [127] to me as Clerk of said Court by Paul Renau Ingles, as Solicitor for the Farmers and Merchants' Bank, Phoenix.

WITNESS my hand and the seal of said Court affixed this 20th day of May, A. D. 1914.

[Seal]

GEORGE W. LEWIS,  
Clerk.

By Robert E. L. Webb,  
Deputy Clerk. [128]

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*In the District Court of the United States in and for  
the District of Arizona.*

CHARLES W. CLARK,

Complainant,

vs.

ARIZONA MUTUAL SAVINGS AND LOAN  
ASSOCIATION and ARIZONA TRUST  
COMPANY,

Defendants.

**Citation [on Appeal (Original)].**

United States of America.

To Arizona Mutual Savings and Loan Association,  
the Arizona Trust Company, Sims Ely, Esq., as  
Receiver for the Arizona Mutual Savings and  
Loan Association and Arizona Trust Company,  
and the Intervening Petitioners Who Were  
Allowed to Intervene in Said Cause by the De-  
cree of March 12, 1914.

You are hereby notified that in a certain case in

equity in the United States District Court in and for the District of Arizona wherein Charles W. Clark is complainant, and the Arizona Mutual Savings and Loan Association and the Arizona Trust Company are defendants, and the Farmers and Merchants' Bank, Phoenix, is or claims to be an intervener, and wherein the persons referred to in the decree of said court entered therein on March 12, 1914, are or claim to be interveners, an appeal has been duly allowed to the Farmers and Merchants' Bank, Phoenix, as intervener therein, to the Circuit Court of Appeals in and for the Ninth Judicial District. You and each of you are hereby cited and admonished to be and appear in the said Court at the city of San Francisco, in the State of California, within thirty days from the date of this citation, to show cause if any there be why the said decree entered in said cause by said Court on [129] March 12, 1914, and why the said order entered in said cause on March 12, 1914, denying the application of the said Farmers and Merchants' Bank, Phoenix, for leave to intervene therein and dismissing the petition of intervention of the said Farmers and Merchants' Bank, Phoenix, each of which is appealed from herein, should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable WILLIAM H. SAWTELLE, Judge of the United States District Court in and for the District of Arizona, this 15th day of April, 1914.

WM. H. SAWTELLE,  
Judge of the United States District Court, for the  
District of Arizona. [130]

[Endorsed]: No. 53. In the District Court of the United States for the District of Arizona. Charles W. Clark, Complainant, vs. Arizona Mutual Savings and Loan Association and Arizona Trust Company, Defendants. Citation. Filed April 15, 1914. George W. Lewis, Clerk.

No. 2425. United States Circuit Court of Appeals for the Ninth Circuit. Citation on Appeal. Filed May 23, 1914. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. By Meredith Sawyer, Deputy Clerk. [131]

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[Endorsed]: No. 2425. United States Circuit Court of Appeals for the Ninth Circuit. Farmers and Merchants' Bank, Phoenix, as Intervener, Appellant, vs. Arizona Mutual Savings and Loan Association and Arizona Trust Company and Sims Ely, as Receiver for the Arizona Mutual Savings and Loan Association and Arizona Trust Company, and the Intervening Petitioners Who Were Allowed to Intervene in the Cause Entitled Charles W. Clark, Complainant, vs. Arizona Mutual Savings and Loan Association and Arizona Trust Company, Defendants, in the Court Below, by the Decree of March 12, 1914, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Arizona.

Received and filed May 23, 1914.

FRANK D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.

In the  
**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

FARMERS AND MERCHANTS'  
BANK, PHOENIX, as Intervener,  
Appellant,

vs.

ARIZONA MUTUAL SAVINGS  
AND LOAN ASSOCIATION and  
ARIZONA TRUST COMPANY  
and SIMS ELY, as Receiver for the  
ARIZONA MUTUAL SAVINGS  
AND LOAN ASSOCIATION and  
ARIZONA TRUST COMPANY,  
and the Intervening Petitioners Who  
Were Allowed to Intervene in the  
Cause Entitled CHARLES W.  
CLARK, Complainant, vs. ARI-  
ZONA MUTUAL SAVINGS AND  
LOAN ASSOCIATION and ARI-  
ZONA TRUST COMPANY, De-  
fendants, in the Court Below, by the  
Decree of March 12, 1914.

Appellees.

**Brief of Appellant**

Filed

SEP 29 1914

PAUL RENAU INGLES,  
Solicitor for Appellant,

Fleming Block,

Phoenix, Arizona.





No. 2425.

In the  
*United States Circuit Court of Appeals for the Ninth  
Circuit.*

FARMERS AND MERCHANTS'  
BANK, PHOENIX, as Intervener,  
Appellant,

vs.

ARIZONA MUTUAL SAVINGS  
AND LOAN ASSOCIATION and  
ARIZONA TRUST COMPANY  
and SIMS ELY, as Receiver for the  
ARIZONA MUTUAL SAVINGS  
AND LOAN ASSOCIATION and  
ARIZONA TRUST COMPANY,  
and the Intervening Petitioners Who  
Were Allowed to Intervene in the  
Cause Entitled CHARLES W.  
CLARK, Complainant, vs. ARI-  
ZONA MUTUAL SAVINGS AND  
LOAN ASSOCIATION and ARI-  
ZONA TRUST COMPANY, De-  
fendants, in the Court Below, by the  
Decree of March 12, 1914.

Appellees.

BRIEF  
OF  
APPEL-  
LANT

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BRIEF OF APPELLANT.

On appeal from the United States District Court for  
the District of Arizona.

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This is an appeal by the Farmers' and Merchants'  
Bank of Phoenix from a decree and from an order of

the United States District Court for the District of Arizona, dated March 12, 1914.

On July 29, 1913, the appellant filed in the court below (R. p 75) its petition in the nature of a general creditors' bill against the Arizona Trust Company. The bill (R. p 39-75) invoked the ancillary jurisdiction of the court below and was intended as a suit auxiliary to the cause of Clark vs. The Arizona Mutual Savings & Loan Association and Arizona Trust Company, which on February 27, 1913, had resulted in a final decree, the terms of which were in process of execution by the receiver of the court below.

The bill was entitled, in the cause of Clark vs. The Arizona Mutual Savings & Loan Association and Arizona Trust Company (R. p. 39) and alleged in substance the existence of Federal jurisdiction of that cause as a controversy between citizens of different states involving the requisite amount.

It asserted the jurisdiction of the court below over the matters presented by the bill depended upon the pendency of the cause in which it was filed and of the exclusive jurisdiction then being exercised by that court over the *res* and subject matter involved in the proceedings.

It fully described the cause in which it filed its bill and in substance alleged it to be a stockholders' suit against the two companies named, instituted for the ben-

efit of the complainant and all others similarly situated, wherein a receiver of the Loan Association, the marshalling of its assets and its distribution to those lawfully entitled thereto, was sought.

It declared that the original suit had been brought to set aside a transfer of the assets of the Loan Association, which had been made to the Trust Company of all the former's property.

It alleged the exclusive character of the jurisdiction exercised by the court below over both companies and all the properties of such companies which were in the hands and control of the court's receiver.

It averred that the approximate value of the assets of the insolvent defendants was in the neighborhood of \$70,000.00; that the liens established and fixed by the terms of the final decree of February 27, 1913, in the cause amounted to about the sum of \$50,000.00, and expressly declared that after the payment of the liens directed by the final decree of February 27, 1913, to be paid, a surplus would remain which would be due and payable to the defendant Trust Company.

It then alleged (R. p 44) that on July 12, 1913, the appellant obtained a judgment in the Superior Court of the State of Arizona in and for the County of Maricopa, against the Trust Company for the sum of \$18,500.00.

It alleged that when this judgment was entered in the state court, the permanent receiver of the court be-



low was then in full and exclusive possession of all of the assets of the Trust Company and that it could not without contempt to the learned court below and precipitating a conflict of jurisdiction between the two courts issue execution upon its judgment or do any other act for the purpose of satisfying its judgment out of the properties of the Trust Company, and that for the reasons set forth no execution had in fact issued.

It alleged that it was without remedy to collect its judgment except with the consent and approval of the court below.

It directed attention to the limited nature of the receivership established by the decree of February 27, 1913, as to the Trust Company and alleged that that receivership should in justice to it as a judgment creditor of the Trust Company be extended to it for its benefit and the benefit of all other judgment creditors of the Trust Company similarly situated, and for the benefit of all those having or claiming to have rights and claims against the Trust Company to the end that these rights and the priorities of each claimant might be ascertained and determined (R. p 46).

The petition then averred (R. p 46) that in addition to the assets then in the hands of the receiver, assets and property belonging to the Trust Company to the extent of many thousands of dollars should be recovered by it from the former officers and directors, among

others, particularly from A. J. Edwards, W. T. Smith and John T. Dunlap, to the end that the insolvent estate might thereby be increased for its benefit and for the benefit of others similarly situated.

The petition then sets forth (R. p. 47) the cause of action against the delinquent officers.

It alleges the accountability of A. J. Edwards to the company in a sum approximating \$32,022.00. This liability was predicated upon breaches of trust including what in reality was nothing but a common larceny of about \$14,522.68, the making of unlawful preferential payments to certain stockholders while the companies were wholly insolvent and unable to discharge their other obligations in full, the pledging of a large quantity of securities which he knew belonged to the Loan Association to secure a loan to the Trust Company of \$6,000.00

The directors, Smith and Dunlap, were charged with liability amounting to many thousands of dollars. The basis of liability as to these officers was breaches of trust involving the conduct of corporate affairs for their own instead of their company's benefit, gross mismanagement and negligence, resulting in heavy loss to the company, which ultimately redounded to their own benefit, and the illegal disposal of the assets of the insolvent estate, consisting in the making of so-called "Ledger Settlements" with the stockholders of the insolvent

estate, the effect of which was to give such persons inequitable preference over and above others similarly situated, which reduced the corpus of the insolvent estate and for which the petitioner sought to have the estate reimbursed. The loss resulting from these unlawful ledger settlements aggregated about \$4,435.67. A further loss of \$3,766.00 was said to result from a conveyance of certain property of the company wholly without consideration moving to the company (R. p 60).

It was charged (R. p 61) that these officers occasioned a loss not exceeding \$36,000.00 to the company by failing to protect one piece of the company's property against foreclosure; another similar loss of not more than \$36,000.00 nor less than \$9,000.00 was alleged (R. p 62-64) and a third transaction similar in nature in which the loss was estimated at \$32,000.00, was set forth.

In addition to these matters, it was alleged (R. p 67) that a large number of the stockholders of the defendant Trust Company are indebted to the Trust Company for the unpaid purchase price and subscription to stock in that company and to the end that the funds in the hands of the court, with which to pay and discharge the debts of the Trust Company to its lawful creditors, might be increased in value the said stockholders of the Trust Company should be required to pay in full their respective subscriptions to the receiver of the Trust Company.

The prayer was (R. p 68) that the limited receivership of the Trust Company be extended to the petitioner's judgment, not only for its benefit, but for the benefit of all other claimants, that a master might be appointed to take proof of and report upon the priorities of claimants against the Trust Company, its assets marshalled and distributed to those found to be lawfully entitled to them; that the petitioner be awarded a preference over the other creditors because of its diligence and the increased enhancement of the estate through its efforts and that process issue directed to the individuals named requiring them and each of them to appear and answer the allegations of the bill.

An accounting from and discovery by the delinquent directors was prayed.

The petitioner expressly asserted the right to file the petition without leave of court and the petition was so filed, but to avoid doubt and confusion concerning the right of the petitioner so to intervene permission to intervene was prayed for and a prayer for general relief was included.

The record shows (R. p 76) that the petitioner's motion to extend the receivership was first noticed for hearing before Circuit Judge Morrow at San Francisco, August 4, 1913.

We do not find the order disposing of the motion in the record, but the application was denied without prej-



udice to the renewal before the District Judge for the District of Arizona, then immediately about to be appointed. The motion was renewed later (R. p 78) and was noticed for argument before the learned court below on September 15, 1913. The matter was heard on September 18, 1913, (R. p 81) and taken under advisement by the court. The motion remained in the breast of the court for many months and it was not until March 12, 1914, that the court below entered the decree of that date (R. p. 92-98) and on the same day denied the application of the appellant (R. p 98-99) to intervene and dismissed its bill.

This order denying the appellant's application to extend the receivership to its judgment was most sweeping in its character. It not only denied the application to extend the receivership, but it expressly denied the appellant's prayer for process against the delinquent directors and it dismissed the appellant's petition (R. p 99) and this was done, although the order expressly recited that no one had interposed any opposition to the appellant's motion (R. p 99).

With all convenient speed thereafter the appellant presented to the learned court below its petition and other appropriate papers for the prosecution of an appeal from the decree and from the order of March 12, 1914, but the application was denied (R. p 100-101).

Thereupon, pursuant to the authority conferred by

Section 132 of the Judicial Code upon the judges of the Circuit Courts of Appeal to allow writs of error and appeals, application for the allowance of the appeal upon the same papers was made to Circuit Judge Morrow and the appeal was duly allowed (R. p 110).

It is to review the alleged decree of March 12, 1914, (R. p 92-98) and the order dismissing appellant's bill or petition (R. p 98-99) that this appeal is prosecuted.

Appellant assigns as error in the decree (R. p 112) that it is a nullity because it assumed after the expiration of the term at which the final decree of February 27, 1913, was entered to nullify and destroy that decree; that the annulment of that decree constituted a lasting prejudice to the appellant because the appellant had by virtue of its judgment and its proceedings below acquired a vested property right in the surplus remaining after the execution of the decree of February 27, 1913, and moreover in effect gave to the ordinary preferred stockholder of the insolvent Trust Company, at whose instance the original decree was nullified, rights in the assets of that insolvent company prior and superior to those of the appellant in its capacity of a lawful judgment creditor of that company.

The errors assigned in the making of the order appealed from present for review the appellant's contention that it has a right to intervene in the cause as to the surplus and to participate in the distribution thereof

and that that right is absolute and not dependent upon the exercise of discretion by the court below (Assignment IV and VIII, page 114-115); also its right to have process issue against the delinquent directors specified (Assignment V, page 114); also its right to have the receivership extended to its judgment (R. p 114-115, Assignment VI). The assignments will be discussed in the order specified above.

### POINT I.

#### THE DECREE OF MARCH 12, 1914, IS APPEAL- ABLE AND SHOULD BE REVERSED.

The right to review the decree of March 12, 1914, is claimed upon two grounds:

1. Because the decree is a nullity.
2. Because as to this appellant it is a final adjudication destructive of its rights.

The right to review a decree which is a nullity appears to be recognized by *Phillips vs. Negley*, 117 U. S. 665.

In that case the court said, at p 671-672:

"If, on the other hand, the order was made without jurisdiction on the part of the court making it, then it is a proceeding which must be the subject of review by an appellate court."

That the decree of March 12, 1914, is a nullity, we regard as hardly the subject of dispute.

It is indisputable that the decree of February 27, 1913, was duly entered on that day.

The term at which that decree was entered expired by operation of law on April 5, 1913.

The motion to vacate it was filed July 15, 1913, (R. p 38) and on March 12, 1914, the alleged decree which in effect nullified the decree of February 27, 1913, was filed.

Nothing is better settled than the proposition that a Federal Court is without jurisdiction to vacate, annul or modify a final decree after the expiration of the term at which it is granted.

Bronson vs. Schulten, 104 U. S. 410, 415.

Sibbald vs. United States, 12 Pet. 487, 491.

Nor is there any doubt of the final character of the decree of February 27, 1913.

As stated by Professor Simkins in the Second Edition of A Federal Equity Suit, on page 607: "A final decree is one that entirely disposes of the cause so that nothing is left for the court to adjudicate (2 Dan. Ch. Pr. 974 N); or a decree that disposes ultimately of the



suit (Adams Equity, page 375); or a final decree is one determining the litigation on its merits, and leaves nothing to be done, but to enforce by order of execution, what was determined by the court," citing in support thereof the following cases:

Talley v. Curtain, 7 C. C. A. 1, 8 U. S. App. 424,  
58 Fed. 4.

Blythe v. Hinckley, 84 Fed. 238.

Maas v. Lonstorf, 91 C. C. A. 627, 166 Fed. 41.

New Orleans v. Peake, 2 C. C. A. 626, 2 U. S.  
App. 403, 52 Fed. 76.

Harrison v. Clarke, 90 C. C. A. 413, 164 Fed. 539.

Beebe v. Russell, 19 How. 283-286, 15 L. ed. 668,  
669.

Odbert v. Marquet, 99 C. C. A. 60, 175 Fed.  
50, 51.

Wilson v. Smith, 61 C. C. A. 446, 126 Fed. 919;

Scriven v. North, 67 C. C. A. 348, 134 Fed. 366.

Sanders v. Bluefield Waterworks & Improv. Co.,  
45 C. C. A. 475, 106 Fed. 587.

Easton v. Houston & T. C. R. Co., 44 Fed. 9.

St. Louis, I. M. & S. R. Co. v. Southern Exp Co.,  
108 U. S. 24, 27 L. ed. 638, 2 Sup. Ct. Rep. 6.

Andrews v. National Foundry & Pipe Works, 19  
C. C. A. 548, 34 U. S. App. 632, 73 Fed. 517.

Gunn v. Black, 8 C. C. A. 542, 19 U. S. App. 489,  
60 Fed. 159.

Re Michigan C. R. Co., 59 C. C. A. 643, 124 Fed.  
730, 731.

We deem it unnecessary to discuss at length the

contention of the court below that the decree of February 27, 1913, is void for want of jurisdiction.

No jurisdictional defect is apparent on the face of the decree and the argumentative portion of the alleged decree of March 12, 1914, shows that the only claim of invalidity in the decree of February 27, 1913, consists in the assertion that the decree was not supported by the pleadings and that the court exceeded its powers in awarding a lien to the interveners, thereby compelling the parties who were interested in the assets of the Loan Association to bear all the loss incurred in the conduct of that business.

The pleadings in the original suit are not included in this record and indeed have no place here, but the lengthy and minute description of the character of the action contained in appellant's bill (R. p 39 et seq) sufficiently discloses the nature of the pleadings and shows that the decree was well supported thereby. Moreover, we respectfully submit that it is entirely immaterial whether the decree of February 27, 1913, was supported by the pleadings or not. The decree of February 27, 1913, was not made the subject of attack or review before any appellate tribunal. It was certainly good against a collateral attack so long as it stood unreversed. It was never even appealed from, much less reversed. A mere motion to vacate it was made after the expiration of the term at which it was granted, but before the time to review it by appropriate appellate procedure had expired.

Indeed, the motion to vacate was granted not upon any of the grounds specified in the motion, but because it was supposed by the learned court that the decree was not supported by the pleadings and for that reason subject to annulment by it. But as we have indicated, such contention, even if true, presented no grounds for its annulment after the term at which it was granted by a different judge holding the same court which originally gave it life. Such a question, if it existed, was exclusively for an appellate tribunal to pass upon and not for the court below to entertain or determine.

If true, it constituted mere reversible error, not a want of jurisdiction.

This court and not the court below is the court for the correction of errors in such courts. It was obviously not a void decree, however erroneous it may have been.

So, upon the other branch of the court's contention that the court exceeded its authority in awarding the liens described in the decree, the contention is equally without merit. The court, as constituted in February, 1913, was not of the same opinion. It had jurisdiction to determine the matters before it, including the extent and proper exercise of its own authority. It was not for the same court, when presided over by another judge, to readjudicate the same question and to sit in judgment on his predecessor as a court of review and to assume to revise for ordinary alleged error the judicial acts of

his learned predecessor. With great respect, we submit that the court's own statement of the grounds of annulment constitutes its own perfect refutation.

But we say that the decree is appealable by appellant because it is final as to it. The alleged decree of March 12, 1914, obliterated the surplus in which the appellant had acquired a vested interest. That surplus was not again to be created. It was to be and has in part been consumed in the exploits initiated by the decree of March 12, 1914. It finally adjudicated as to appellant that it had no rights in that surplus since obviously if the court had held that appellant had any rights therein it would not have wiped out the surplus to its detriment and rendered its rights therein absolutely unenforceable except by this appeal. The question whether a decree is final and appealable is not determined by the name which the court below gives it, but must be tested by a consideration of the essence of what is done by the decree.

Potter v. Beal, et al, 50 Fed. 860.

See also Standley v. Roberts, 50 Fed. 836.

Sanders v. Bluefield Waterworks & Imp. Co., 160 Fed. 587.

Hill v. Chicago & Evanston Railroad Co., 140 U. S. 52.

The effect of the decree of March 12 was greatly to enlarge the class of persons alleged to be entitled to participate in the assets, which by means of the decree of



February 27, 1913, had been conserved and were in process of liquidation to meet a specific charge of about \$50,000.00, leaving a balance of about \$20,000.00 to be turned over to appellant's judgment debtor.

But the alleged decree of March 12 swept away the specific lien of \$50,000.00, permitted the reception of approximately one hundred more stockholders in the insolvent Trust Company, who claimed thousands of dollars of its assets, into the litigation to the end that THEY might participate in the assets of the Loan Association, a company in which they were no longer even stockholders, even though such participation meant that stockholders in the insolvent institution, the Trust Company, were to be assured and guaranteed a preference and priority in the distribution of such assets over and above the lawful judgment creditor of the insolvent institution.

However, intermediate and interlocutory the instrument of March 12 may have been in its application to those effected thereby other than appellant, does not deprive that decree of its absolute and complete finality as to appellant.

We respectfully submit that as to the appellant the decree of March 12, 1914, was final and for that reason appealable.

We respectfully submit that the foregoing discussion not only demonstrates the appealability of that de-

cree as to appellant, but it also shows the utter and absolute lack of foundation to support it. It shows that without legal authority, nay more, there being a total absence of power so to do, the court below destroyed a vested property right of the appellant which, but for its unauthorized act and the consequent impairment of the assets of the estate, was worth \$18,500.00. To revise that error, this appeal is prosecuted.

That the appellant is prejudiced by the errors specified needs no further demonstration.

Those errors, we respectfully submit, must result in the reversal of the decree of March 12, 1914.

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## POINT II.

THE ORDER OF MARCH 12, 1914, IS APPEALABLE AND SHOULD BE REVERSED.

The order is appealable.

Credits Commutation Company v. United States,  
177 U. S. 311.

Ramsey v. Illinois Steel Company, 100 C. C. A.  
323, 176 Fed. 863.

Price v. Union Land Company, 187 Fed. 886.

We respectfully submit that the elimination of the decree of March 12, 1914, necessarily and of itself must result in the reversal of the order of the same date.

This order, as we have seen, denied to the appellant

access to the court, which had exclusive jurisdiction of the controversy presented by appellant's bill. Its denial was a denial of the right to intervene, a right which is absolute in such cases and not the subject of discretionary denial by the court.

It has uniformly been the practice in the Federal Courts to file creditors' bills and bills of the nature thereof as a matter of right without leave of court.

Credits Commutation Co. v. United States. 91 Fed. 573, 177 U. S. 315-316.

Myers v. Fenn, 5 Wall 207.

Richmond v. Trous, 121 U. S. 43, 47.

Nat. Bank vs. Allen, 90 Fed. 545, 555.

Hubb v. Bidwell, 151 Fed. 564.

It denied to the appellant the writ of subpoena, for which it prayed, and by so doing the appellant was denied process, by which it sought to bring before the court men charged with breaches of trust and the misappropriation of funds committed to them as fiduciaries in order that they might be compelled to account for their misconduct.

Instead of process issuing as a matter of course, the learned court by its order expressly denied the right thereto and in effect accorded these particular individual defendants the extraordinary privilege of immunity from suit in that court. They were not even to be re-

quired to respond to the court's process or the appellant's complaint.

Before service of process upon them and without the necessity of contention upon their part, it was determined by the learned court that no cause of complaint existed in appellant against them and now after a complete paralysis of judicial process for a period of more than a year the right of these defendants to be exempt from the service of process in the court below continues to and will exist until reversal here.

We think the admitted insolvency of the Trust Company, its admitted debt, evidenced by a judgment of a competent court of record in favor of the appellant, the exclusive character of the jurisdiction which the court below was exercising over the subject matter in which the appellant was interested, shows without further argument its indisputable right to the extension of the receivership of the Trust Company for appellant's benefit and the benefit of those similarly situated.

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### POINT III.

THE REVERSAL OF THE ORDER OF MARCH  
12, 1914, ALONE AFFORDS NO ADEQUATE  
RELIEF TO APPELLANT.

Should it be determined that appellant was not entitled to appeal from the alleged decree of March 12,



1914, and that it is entitled to appeal from the order of that date and that the order should be reversed, then we respectfully submit that this court in aid of its appellate jurisdiction and in order to render the reversal of the order of March 12, 1914, effective should issue a writ of mandamus to the court and the learned judge below to expunge from the record the decree of March 12, 1914, reinstate the decree of February 27, 1913, and carry out the terms thereof. To reverse the order of March 12, 1914, without reinstating and enforcing the decree of February 27, 1913, would afford no remedy whatever to the appellant and would not restore to it its vested property right in the surplus remaining after the payment of the liens established by the decree of February 27, 1913.

We respectfully submit that the decree of March 12, 1914, and the order of the same date should be reversed with costs.

Respectfully submitted,

PAUL RENAU INGLES,  
Solicitor for Appellant,  
Farmers' & Merchants' Bank, Phoenix,  
Phoenix, Arizona,  
Fleming Block.

No. 2425.

In the

**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

Farmers' and Merchants'  
Bank, Phoenix, as Intervener,  
*Appellant*

vs.

Arizona Mutual Savings and  
Loan Association and Arizona  
Trust Company and Sims Ely,  
as Receiver for the Arizona  
Mutual Savings and Loan As-  
sociation and Arizona Trust  
Company, and the Intervening  
Petitioners who were allowed  
to intervene in the cause en-  
titled Charles W. Clark, Com-  
plainant, vs. Arizona Mutual  
Savings and Loan Association  
and Arizona Trust Company,  
Defendants, in the Court be-  
low, by the Decree of March  
12, 1914.

*Appellees*

B R I E F O F A P P E L L E E S ,  
J. L. WARING, C. T. WISE, et al.

R. E. MORRISON  
J. E. MORRISON,  
BENTON DICK,  
O. T. RICHEY,

Solicitors for Appellees,  
Fleming Building,  
Phoenix, Arizona



In the  
*United States Circuit Court of Appeals for the Ninth  
Circuit.*

---

Farmers' and Merchants'  
Bank, Phoenix, as Intervener,  
*Appellant*

vs.

Arizona Mutual Savings and  
Loan Association and Arizona  
Trust Company and Sims Ely,  
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plainant, vs. Arizona Mutual  
Savings and Loan Association  
and Arizona Trust Company,  
Defendants, in the Court be-  
low, by the Decree of March  
12, 1914.

*Appellees*

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Brief of Appellees

J. L. Waring,

C. T. Wise, et al.

On appeal from the United States District Court  
for the District of Arizona.

---

This is an appeal by the Farmers' and Mer-  
chants' Bank of Phoenix, from a decree and an order  
of the United States District Court for the District  
of Arizona, of date March 12, 1914.

The facts, so far as the record filed in these pro-  
ceedings discloses, and so far as furnished by appel-



lant, and upon which this appeal is based, are fairly stated in the brief of appellant, and to that extent only would seem to fully inform the Court.

To appellees it would appear that there are no sufficient facts before this Court by which it may be properly informed in these premises so as to justify it in coming to a conclusion and determination upon the issue of whether the decree of March 12, 1914, is a nullity, for the reason that this Court must necessarily first determine whether the decree of February 27, 1913, is one given and rendered within the power, authority and jurisdiction of the court below. And before this Court may come to any conclusion or determination as to whether the decree of February 27, 1913, is or is not a decree within the power, authority and jurisdiction of the court below, it seems to the appellees this court must have, for its consideration in that respect, the whole record of the action out of which this appeal grew.

As an illustration of this contention appellees respectfully call the attention of this Court to portions of the pleadings in the action prior to the giving of the decree of February 27, 1913, to-wit:

"That the transactions herein set forth as made between the defendants above named may be declared to be annulled and of no force and effect, and that a restitution of all of the assets of the defendant Arizona Mutual Savings and Loan Association from the defendant Arizona Trust Company be adjudged and decreed and that an

accounting between both of the defendants above named be had and taken, and that an accounting between the defendant Loan Association and your Orator and other stockholders similarly situated be ordered and decreed.

And that, inasmuch as the said defendant Loan Association has been since April 11, 1911, and now is insolvent, as aforesaid that a receiver be appointed with authority to reduce to possession all of the assets of the said defendant Loan Association wheresoever found or situated, and that the court appoint a master to take proof of the facts alleged in this, your Orator's, bill and to determine the rights and equities of your said Orator, and all of the parties concerned herein. And that the affairs of the said defendant Loan Association be wound up, its assets marshaled as aforesaid, and distributed to those found to be entitled thereto."

The foregoing being the most essential portion of the prayer of the complaint of Clark in the original action, and adopted by those persons intervening prior to the decree of February 27, 1913, and is based upon the pleadings entirely consistent therewith.

Clark filed his action for himself and "others similarly situated." There would seem to be but one meaning or construction to be placed or attached to the expression "others similarly situated" in the original action, and that is, that that expression included

and was intended to mean and include all of those persons who were "similarly situated" at the time of the illegal transfer of the assets of the Arizona Mutual Savings and Loan Association (hereinafter referred to as the Loan Association) by it to the Arizona Trust Company (hereinafter referred to as the Trust Company) and in respect to their several interests and title in and to those assets, and *not* restricted to those who were, *at the time of the filing of his complaint*, "similarly situated," in respect to his relative situation thereto at that time.

Both decrees, one directly and the other in effect, determine the transfer by the Loan Association of its assets to the Trust Company, to have been fraudulent and illegal. The decree of February 27, 1913, held the transaction "unlawful and invalid and not binding" only as to "the interveners herein or upon the other outstanding and non-exchanging stockholders in the defendant Loan Association," while the decree of March 12, 1914, held the "transfer of the assets of the Loan Association were clearly and plainly illegal and fraudulent and without effect to legally transfer these assets and clearly establish the right of the Loan Association to a full restitution."

The transaction being, in law and upon the facts, illegal and fraudulent, the rights of the stockholders in the Loan Association at the time of such transfer were never disturbed and followed the property wheresoever it might go. Some of the stockholders of the Loan Association, believing in the representa-

tions made to them by the officers of both Loan Association and the Trust Company, in order to follow the property, exchanged their stock in the Loan Association for stock in the Trust Company, where the title was by them supposed to rest. Others of the stockholders did not exchange their stock, but held their original status with the Loan Association. Those exchanging stockholders intervening prior to the decree of February 27, 1913, are in no better position, so far as their interest in the transferred property is concerned, than those who did not intervene until under the decree of March 12, 1914, or who have not intervened at all, for the reason that the interests of all thereof remained the same throughout, the whole scheme and all of the transactions entered into looking toward carrying the same to a consummation being void and illegal for fraud.

While the foregoing is but a most brief resume of what was pleaded, prayed for and done, it will serve to evidence to this Court the absolute necessity of its having before it the full record of the whole action in the court below before it will be able to arrive at an intelligent determination of whether the decree of February 27, 1913, was given and rendered in excess of the power, authority and jurisdiction of the court rendering it, and as this Court must first determine this point before it may determine whether the decree of March 12, 1914, is a nullity, it must necessarily have before it the full record of the action before the court below.



Such record is not before this Court in this appeal, and, therefore, appellees respectfully submit that this appeal should be dismissed for insufficient facts before it upon which to reverse or affirm the decree of March 12, 1914, or the order of court of that date.

No part of the record of the action before the court below prior to the decree of February 27, 1913, is before this Court in this appeal, and, therefore, this Court is wholly uninformed in this appeal of any facts upon which it may base any finding whatever as to whether the decree of February 27, 1913, is rendered in excess of the power, authority and jurisdiction of the court rendering it, and hence unable to base any finding as to whether the decree and order of March 12, 1914, are nullities, and this appeal should be dismissed therefore.

If this Court finds sufficient facts are before it in this appeal to come to a determination of whether the decree and order of March 12, 1914, are nullities, then, and in that event, appellees respectfully adopt the authorities and arguments as contained in the brief filed in this Court in support of Respondent's return and response to the Motion for leave to file Petition for Writ of Mandamus and for Order to Show Cause, In the Matter of the Application of John Dennett, Jr., et al., for a Writ of Mandamus, directed to the Honorable William H. Sawtelle, District Judge of the United States District Court for the District of Arizona, and directed to said District Court, as the authorities and arguments of these appellees for the

purpose of answering and meeting the contentions of appellant herein, and in support of contentions of appellees that the decree and order of the United States District Court for the District of Arizona, of date March 12, 1914, and from which this appeal is taken, are valid and properly within the power, authority and jurisdiction of said court last named to make and give, and such adoption aforesaid is so made to the same effect and extent as if appellees had made and set forth herein the said authorities and arguments.

Appellees think, in any event, that there are no sufficient facts apparent in the record, or at all, justifying this Court in reversing the decree and order of March 12, 1914, the facts in the record of the action in the court below showing conclusively that the decree of March 12, 1914, is consistently and completely in accordance with the pleas and prayers of each and every one of the litigants in the action from its inception to the giving and rendering of the decree last aforesaid.

Appellees respectfully submit that the decree and order of March 12, 1914, should stand, that this appeal should be dismissed, and that appellees have their costs herein.

Respectfully submitted,

R. E. MORRISON,  
J. E. MORRISON,  
BENTON DICK,  
O. T. RICHEY.

Solicitors for Appellees

J. L. Waring, C. T. Wise, et al.  
Fleming Building,  
Phoenix, Arizona.



IN THE  
**United States**  
**Circuit Court of Appeals**  
For the Ninth Circuit

FARMERS AND MERCHANTS'  
BANK, PHOENIX, as Intervener,  
Appellant,

vs.

ARIZONA MUTUAL SAVINGS  
AND LOAN ASSOCIATION and  
ARIZONA TRUST COMPANY  
and SIMS ELY, as Receiver for the  
ARIZONA MUTUAL SAVINGS  
AND LOAN ASSOCIATION and  
ARIZONA TRUST COMPANY,  
and the Intervening Petitioners Who  
Were Allowed to Intervene in the  
Cause Entitled CHARLES W.  
CLARK, Complainant, vs. ARI-  
ZONA MUTUAL SAVINGS AND  
LOAN ASSOCIATION and ARI-  
ZONA TRUST COMPANY, De-  
fendants, in the Court Below, by the  
Decree of March 12, 1914.

Appellees.

**Reply Brief of Appellant**

PAUL RENAU INGLES,

Solicitor for Appellant,

Fleming Block,

Phoenix, Arizona.

**Filed**  
OCT 13 1914

F. D. Monckton,  
Clerk.





No. 2425.

In the

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FARMERS AND MERCHANTS'  
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ARIZONA MUTUAL SAVINGS  
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ARIZONA MUTUAL SAVINGS  
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ZONA TRUST COMPANY, De-  
fendants, in the Court Below, by the  
Decree of March 12, 1914,  
Appellees.

REPLY  
BRIEF  
OF  
APPELLANT.

---

REPLY BRIEF OF APPELLANT.

Appellant's counsel has been served with a brief in behalf of the appellees, J. L. Waring, et al, and a brief by the counsel for the receiver of the Arizona Mutual Savings and Loan Association and Arizona Trust Company and by the counsel for the receiver purporting also

to represent the Arizona Mutual Savings and Loan Association and the Arizona Trust Company. Each of these appellees resist reversal of the order of March 12 and the decree of the same date, although it appears of record that not one of these appellees resisted below the application of the appellant for leave to intervene, which application (R. p 99) resulted in the order of March 12, 1914, denying leave to intervene, from which this appeal is taken. The argument of counsel for Waring and others is that the record before the court is insufficient to enable the court to determine the validity of the decree of February 27, 1913, in the case of Clark vs. Arizona Mutual Savings and Loan Association and Arizona Trust Company, because no part of the record in that cause except the decree itself is brought before the court, but that if this court finds the record is sufficient then these appellees seek to avail themselves of the argument made by the respondent in the mandamus proceedings directed against the court below and which is here pending for determination.

In response to this position, we respectfully point out that there is before the court in the record on this appeal the decree of February 27, 1913 (R. p 1-15), the bill or petition in intervention of the appellant (R. p 39-72), the appellant's motion to intervene (R. p 76, 78), the order denying the motion (R. p 98, 99), the decree of March 12, 1914 (R. p 92-98), and the petition and mo-

tion of Waring, et al, from which the decree of March 12, 1914, resulted (R. p 29-38).

What more is necessary to enable this court to review the decree of March 12, 1914, as to this appellant and to review the order of March 12, 1914, dismissing the appellant's bill?

The character of the litigation in which the decree of February 27, 1913, was rendered is set forth in minute detail in the appellant's bill or intervening petition. It appears therefrom and from the final decree of February 27, 1913, that when the court below entered the decree it had jurisdiction over the parties before it and over the subject matter.

What more must appellant show?

Appellant was not a party to the record when the decree of February 27, 1913, was entered. It took no part in the proceedings which culminated in that decree, but it acquired a vested interest and property right in the surplus moneys established by that decree in favor of the Arizona Trust Company by virtue of the recovery by it of a judgment against the Trust Company in a court of competent jurisdiction.

While the appellant invoked the ancillary jurisdiction of the court below by the filing of its bill that jurisdiction proceeds as though the suit were entirely independent of the suit in which it was filed;



Continental Trust Company, et al, vs. Toledo, etc.  
Railroad Company, 82 Fed. 642-646.

After the jurisdiction of the ancillary suit is attached the proceedings are entirely independent of and collateral to the proceedings prior to the final decree in the original case.

But, to avail itself of the decree of February 27, 1913, must the appellant retry that cause before this court as upon an appeal from that decree long after the expiration of the term at which it was entered and long after the expiration of the time to appeal therefrom? We think not.

This appellant has the right to take the decree of February 27, 1913, as it finds it and rely upon its validity as disclosed by the face thereof and by the description of the nature of the litigation (which description is admittedly correct) contained in its bill in intervention.

When the appellant filed its bill below, the decree of February 27, 1913, stood unreversed. The term at which it was entered had long since expired. It was immune from lawful attack by the court which granted it even when presided over by another judge. That decree is now irreversible for error, because no appeal from it was ever allowed or presented. That decree is not before this court now upon appeal.

Consequently, appellant is entitled to rely upon the

undisputable presumption of validity which is accorded to the judgments and decrees of all courts of general original jurisdiction and the decree of February 27, 1913, is entitled here to absolute verity.

But, if the record were deficient because it omits the proceedings upon which it was based, counsel is credibly informed that a full record of the decree and pleadings is before this court in the mandamus proceeding to which these appellees refer. Counsel for the appellees are familiar with these mandamus proceedings and may without embarrassment refer thereto. Consequently, we respectfully ask that any deficiency in this record which the mandamus record supplies may be available to the court in the consideration of this appeal.

But, when counsel for the appellees adopt the argument of the respondent in those proceedings as their brief on this appeal, we find it difficult, if not impossible, to reply to such an argument, because, not being a party to the mandamus proceeding, we have never been served with it and are not familiar with it except as counsel have informally advised us that it is in substance the same argument which counsel for the receiver makes on this appeal, the response to which we now approach.

At the outset, we respectfully challenge the right of the receiver to resist this appeal, in-as-much as no resistance to the application of the appellant was made by any one below, although both defendant companies and

the receiver had due notice of the application (R. p 77, 79).

We challenge the authority of counsel to represent the defendant companies here at all. These companies were represented at the trial by other counsel, whose name was and we believe is still of record below, and we have received no notice of any withdrawal of appearance by such counsel, nor have we had any notice of the appearance of counsel for the receiver as counsel for these two companies. We dispute the right of the same counsel to represent the receiver and the defendant companies as well and we protest against such appearance.

As a judgment creditor of the defendant Trust Company, appellant has the right to expect from the receiver of that company the protection of that company's interest exclusively in its behalf.

Instead of receiving such protection, this same receiver, through its same counsel, is asserting rights inimical to the interest of the defendant Trust Company in supporting the annulment of the decree of February 27, 1913, under which the Trust Company was entitled to receive about \$20,000, and is supporting the decree of March 12, 1914, under which the Trust Company is stripped of the last vestige of property for the benefit of stockholders in a Loan Association in which appellant has no interest.

In response to the merits of the argument made by

counsel for the receiver and both defendants, we say that the argument is utterly irrelevant to the issues presented to this court upon this appeal. In reality, it seeks to subject the decree of February 27, 1913, to review here as upon an appeal from that decree. No such appeal exists. The alleged absence of jurisdiction in the court to grant the decree of February 27, 1913, exists in nothing but matters which might have subjected the decree to correction in an appellate court had an appeal been duly prosecuted, but which present no jurisdictional defects whatever.

Besides the generous concession contained on pages 41-44 of this brief renders further argument unnecessary. The concession is

(Page 41) "If the decree of February 27, 1913, is sustained, it will be admitted by appellee that the order denying the right of appellant to intervene is error \* \*."

(Page 44) "Appellant is by the order made March 12 granted an appeal from the order denying him leave to intervene (Record p 100), although appellant is denied the right to appeal from the judgment because, as we have endeavored to show, it was not a proper party to the original cause. With this statement, we are prepared to admit contentions of appellant contained in its brief, pages 10, 11, 12, 13, 14 and 15 but we do deny that plaintiff has been injured within the scope and purview of the case of Credits Commutation Company vs.



United States, 91 Fed. 573, 177 U. S. 315-316 and other cases cited on page 18 of its brief."

We respectfully refer the court to the pages of our brief to which this concession relates.

It contains the vitals of the appellant's argument, which we are now told is conceded.

It includes our claim that the decree is a nullity and should be reversed. It includes a concession that the decree of February 27, 1913, was and is a final adjudication.

In fact, the concession admits the appellee out of court.

We, therefore, submit that the decree and order appealed from should be reversed with costs.

Respectfully submitted,

PAUL RENAU INGLES,  
Solicitor for Appellant,  
Farmers' & Merchants' Bank, Phoenix,  
Phoenix, Arizona,  
Fleming Block.

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In the

**United States**

**Circuit Court of Appeals**

**For the Ninth Circuit**

---

FARMERS AND MERCHANTS'  
BANK, PHOENIX, as Intervener,  
Appellant,

vs.

ARIZONA MUTUAL SAVINGS  
AND LOAN ASSOCIATION and  
ARIZONA TRUST COMPANY  
and SIMS ELY, as Receiver for the  
ARIZONA MUTUAL SAVINGS  
AND LOAN ASSOCIATION and  
ARIZONA TRUST COMPANY,  
and the Intervening Petitioners Who  
Were Allowed to Intervene in the  
Cause Entitled CHARLES W.  
CLARK, Complainant, vs. ARI-  
ZONA MUTUAL SAVINGS AND  
LOAN ASSOCIATION and ARI-  
ZONA TRUST COMPANY, De-  
fendants, in the Court Below, by the  
Decree of March 12, 1914:  
Appellees.

NO. 2425.

---

MEMORANDUM

In behalf of Appellees, Interveners named in final  
decree of February 27, 1913.

**Filed**

OCT 13 1914

F. D. Monckton,

WILLIAM M. SEABURY,  
Solicitor for Appellees who are  
Interveners named in the De-  
cree of February 27, 1913.  
Fleming Building,  
Phoenix, Arizona.



In the  
*United States Circuit Court of Appeals for the Ninth  
Circuit.*

---

FARMERS AND MERCHANTS'  
BANK, PHOENIX, as Intervener,  
Appellant,

vs.

ARIZONA MUTUAL SAVINGS  
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ARIZONA MUTUAL SAVINGS  
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LOAN ASSOCIATION and ARI-  
ZONA TRUST COMPANY, De-  
fendants, in the Court Below, by the  
Decree of March 12, 1914.

Appellees.

NO. 2425.

---

MEMORANDUM

In behalf of Appellees, Interveners named in final  
decree of February 27, 1913.

---

This is an appeal by the Farmers & Merchants' Bank  
of Phoenix, Arizona, from an order of the District



Court for the District of Arizona, dated March 12, 1914, denying its application for leave to intervene as to the surplus moneys in the case of Clark vs. The Arizona Mutual Savings and Loan Association and the Arizona Trust Company, which order dismissed the petitioners' bill in intervention, and also from the alleged decree entered in said cause upon the same day, which assumed to modify the final decree theretofore entered in said cause on February 27, 1913.

These appellees, who are all of the interveners named in the final decree of February 27, 1913, have been cited to appear upon this appeal and have appeared herein.

The only purpose for which these appellees appear is to disclaim any responsibility for the existence either of the order or alleged decree of March 12, 1914, from both of which this appeal is prosecuted.

It appears from the record before the Court that the appellant made no attack upon the validity of the decree of February 27, 1913. On the contrary, its application for leave to intervene in the cause and to participate only in the surplus moneys remaining after the liens established by that decree had been fully discharged, affirmed its validity.

The intervening petition, which was in the nature of a general creditor's bill, ancillary to the main proceeding, had for its further object and purpose the issue of process against the individuals named therein, to the end

that they might be required to account for their official misconduct as officers and directors of the insolvent companies here involved, and a restitution of many thousands of dollars to the receiver of these institutions might thereby be compelled.

The proceedings contemplated by the appellant's bill, if successful, would largely increase the fund upon which the interveners named in the decree of February 27, 1913, who are appellees herein, together with the other persons named in said decree, have a lien admittedly prior to that claimed by the appellant.

Consequently, these appellees did not oppose the appellant's application below and do not here oppose what appears to be the appellant's clear right to relief. These appellees sought to protect their interest in the preservation of the decree of February 27, 1913, by an application to this Court on May 4, 1914, for an order directing the learned Court below to show cause why a mandamus should not issue to induce the Court below to vacate the alleged decree of March 12, 1914, and to expunge it from the records as a nullity, because it assumed to modify and in effect to annul the final decree of February 27, 1913, long after the expiration of the term at which this latter decree was entered.

The order issued May 21, 1914, and is now returnable before this Court October 13, 1914, and still remains undetermined.

These appellees still rely exclusively upon their proceeding by mandamus for the protection of their rights in the premises.

They have prosecuted no appeal from the alleged decree of March 12, 1914, nor from the order of the same date which is brought here for review by appellant.

Counsel for these appellees has deemed it his duty simply to appear and disclaim responsibility for the errors committed below as evidenced by the order appealed from and by the alleged decree of March 12, 1914, to the end that upon a reversal thereof the costs of this appeal may not be imposed upon these appellees, who are in no way responsible for the commission of the errors complained of.

These appellees respectfully pray that they be discharged hence without costs as against them.

Respectfully submitted,

WILLIAM M. SEABURY,

Solicitor for Appellees who are  
Intervenors named in the De-  
cree of February 27, 1913.

Fleming Building,  
Phoenix, Arizona.

San Francisco, October 14, 1914.

No. 2425.

— IN THE —

## United States Circuit Court of Appeals for the Ninth Circuit

FARMERS AND MERCHANTS' BANK,  
PHOENIX, as Intervenor,

Appellant,

vs.

ARIZONA MUTUAL SAVINGS AND  
LOAN ASSOCIATION and ARIZONA  
TRUST COMPANY and SIMS ELY,  
as Receiver for the ARIZONA MU-  
TUAL SAVINGS AND LOAN AS-  
SOCIATION and ARIZONA TRUST  
COMPANY, and the Intervening Peti-  
tioners who were allowed to Intervene  
in the Cause entitled CHARLES W.  
CLARK, Complainant, vs. ARIZONA  
MUTUAL SAVINGS AND LOAN  
ASSOCIATION and ARIZONA  
TRUST COMPANY, Defendants, in  
the Court Below, by the Decree of  
March 12, 1914,

Appellees.

**Brief of the Arizona Mutual Savings and Loan Association and Arizona  
Trust Company and Sims Ely, as Receiver for the Arizona Mu-  
tual Savings and Loan Association and Arizona Trust Company,  
Appellees.**

Filed this ..... day of ....., 1914.

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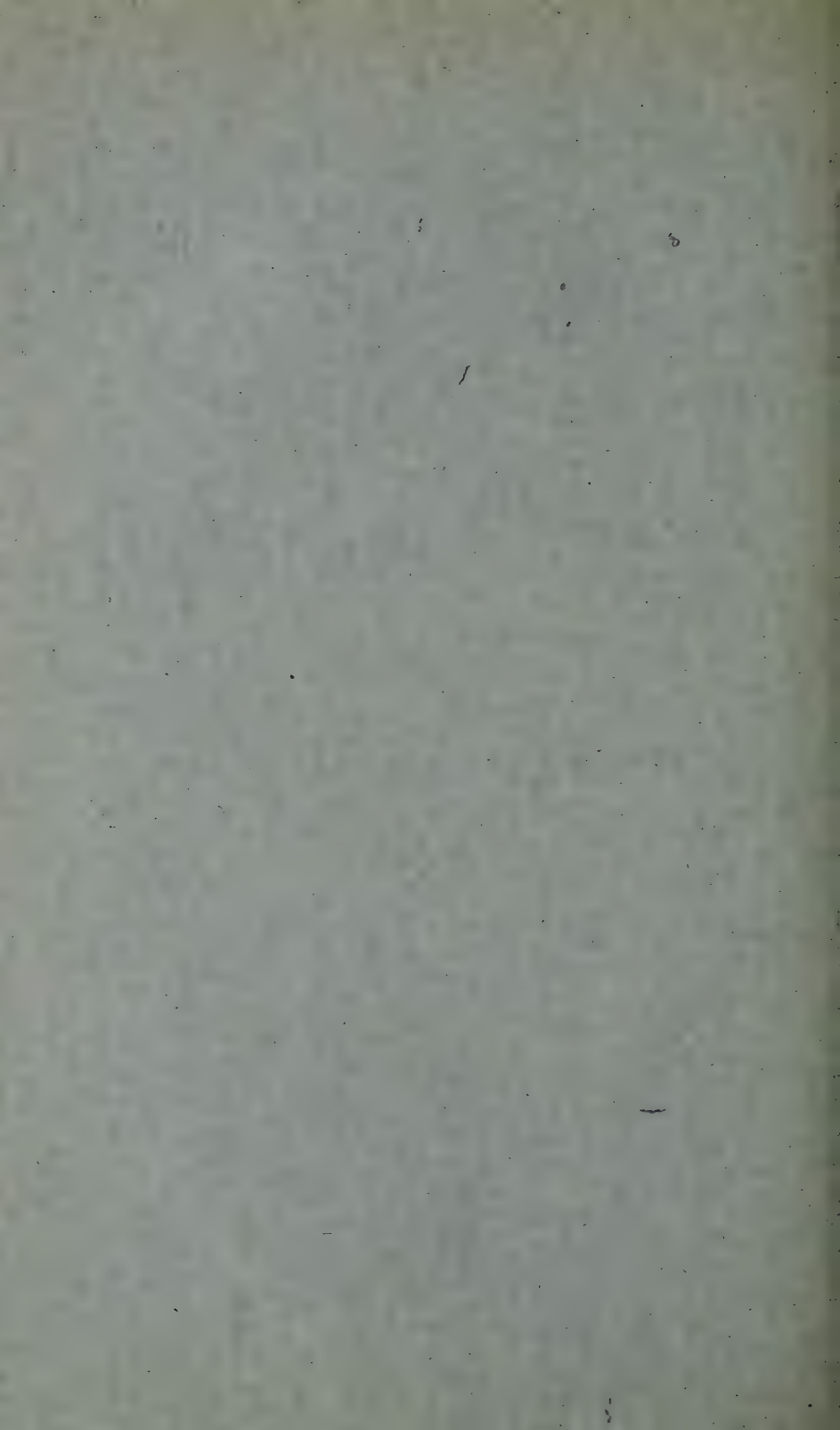
**GEORGE J. STONEMAN,  
REESE M. LING,**

Solicitors for Arizona Mutual Savings and Loan Associa-  
tion and Arizona Trust Company and Sims Ely, as Re-  
ceiver for the Arizona Mutual Savings and Loan As-  
sociation and Arizona Trust Company.

Phoenix Printing Company, Phoenix, Ariz.

OCT 13 1914





No. 2425.

— IN THE —

## United States Circuit Court of Appeals for the Ninth Circuit

FARMERS AND MERCHANTS' BANK,  
PHOENIX, as Intervenor,

Appellant,

vs.

ARIZONA MUTUAL SAVINGS AND  
LOAN ASSOCIATION and ARIZONA  
TRUST COMPANY and SIMS ELY,  
as Receiver for the ARIZONA MU-  
TUAL SAVINGS AND LOAN AS-  
SOCIATION and ARIZONA TRUST  
COMPANY, and the Intervening Peti-  
tioners who were allowed to Intervene  
in the Cause entitled CHARLES W.  
CLARK, Complainant, vs. ARIZONA  
MUTUAL SAVINGS AND LOAN  
ASSOCIATION and ARIZONA  
TRUST COMPANY, Defendants, in  
the Court Below, by the Decree of  
March 12, 1914,

Appellees.

**Brief of the Arizona Mutual Savings and Loan Association and Arizona Trust Company and Sims Ely, as Receiver for the Arizona Mutual Savings and Loan Association and Arizona Trust Company, Appellees.**

In this proceedings appellant claims the right to intervene under a decree rendered in the District Court of Arizona of date February 27, 1913. It expressly disavows the right to

intervene under decree of March 12, 1914. Its right to intervene depends primarily upon the jurisdiction of the court to enter the decree of February 27, 1913. For the purpose of determining whether or not this appeal is well taken it seems absolutely necessary to first determine whether the decree of February 27, 1913, was within the jurisdiction of the court to enter, and this in turn depends upon the pleadings in the main suit of Charles W. Clark against defendants and appellees named above. From this point of view it is necessary to a correct understanding of the controversy involved in this appeal not only that there shall be made a statement of facts additional to the statement contained in the Brief of appellant, but that, without objecting to the sufficiency of the record presented by appellant upon the ground that it does not in itself contain a sufficient statement to enable the court to pass upon the controverted points, reference be made by appellees, by permission of this Court, to the pleadings contained in the Transcript of Record filed in cause No. 2417, being an application for a writ of mandamus directed to Honorable William H. Sawtelle, Judge of the United States District Court of Arizona. To this end and for these reasons we beg the indulgence of the Court in presenting the following additional

#### STATEMENT.

[On July 15th, 1912, Charles W. Clark as complainant as a minority stockholder acting in a representative capacity filed a Bill of Complaint in behalf of the Arizona Mutual Savings

and Loan Association and its stockholders in which it is alleged: among other things, that the complainant is one of the many stockholders in said Loan Association who are the holders and owners of certificates of stock therein, and as such are entitled to all the rights, privileges and property of such stockholders, and that said rights, among others, include the right of complainant and all other stockholders similarly situated, to participate in all of the assets of the defendant Loan Association, and upon the dissolution thereof, to receive such, if any, of the property as may remain undistributed as the property of the defendant Loan Association after it had discharged all of its obligations; that the officers of said Association, knowing that the same was insolvent and unable to meet its obligations, and without the knowledge of complainant and many others similarly situated, entered upon a fraudulent and corrupt agreement with certain persons for the organization of the Arizona Trust Company for the purpose of taking over the assets and property of the Loan Association; that a pretended directors' meeting and stockholders' meeting, at which the Loan Association, in consideration of 1300 shares of the capital stock of the Trust Company, agreed to deliver to the Trust Company all of the said Loan Association's assets and property; that said Loan Association had no right to convey all or any of its assets to the said Trust Company, and that the said transfer was in fact a corrupt scheme; that the Loan Association was insolvent, that its officers knew this fact, and that they were trustees for the benefit of the complainant and the other stockholders sim-



ilarly situated, and that the assets were impressed and charged with a trust for the benefit of the stockholders; that there was a close and intimate relationship of trust and confidence existing between the officers of the defendant Trust Company and the officers of the Loan Association, and that it was their duty to safeguard and protect the interests of complainant and other stockholders; that these officers violated their duties of trust and confidence, and dealt with the property belonging to the Loan Association for their own private and selfish ends, and without the slightest benefit to either the Loan Association or its stockholders; that the transfer of the assets of the Loan Association to the Trust Company was fraudulent and void; that at the time, the Trust Company had no assets or property of any kind or character, and had none at the time it entered into the agreement with the Loan Association, and that the 1300 shares of stock of the Trust Company had no value of any kind or character, and that the assets of the Loan Association were intermingled with the assets of the Trust Company in a deliberate and premeditated attempt to secure the assets and property of the Loan Association at a sacrifice of the rights of its stockholders; that it was impossible to determine the rights and equities of complainant and the other stockholders of the Loan Association without a judicial accounting between both of the defendant Companies, and that the officers and directors be compelled to account for their official misconduct in the matters set forth, and for that reason complainant brings this bill in equity in his own behalf, and in behalf of all others similarly situated, to the end that

the transactions herein above set forth, made between the defendants above named, be annulled and declared void and held for naught, and to the end that an accounting may be had between the two defendants, and between the Loan Association and other stockholders similarly situated; that a receiver be appointed to take charge of and administer the assets of the Loan Association; that others similarly situated who may desire to intervene, be permitted to do so, and that they be awarded such relief as to a court of equity may seem proper.

The prayer of the bill was:

(1) That the transactions between the defendants be declared void;

(2) That a restitution of all the assets of the Loan Association by the Trust Company be decreed;

(3) That an accounting between the defendants be had;

(4) That an accounting between the Loan Association and the complainant and those other stockholders similarly situated be decreed;

(5) That a receiver for the Loan Association be appointed to reduce its assets to possession;

(6) That a Master be appointed to take evidence of the facts alleged in the bill, "and to determine the rights and equities of complainant and *all of the parties concerned herein.*"

(7) "That the affairs of the said defendant Loan Association be wound up, *its assets marshalled as aforesaid, and distributed to those found to be entitled thereto.*"

Thereafter several petitions in intervention were filed by intervenors represented by personal counsel, each petition of intervention adopting all of the averments of the original bill in equity filed by Clark. On February 27, 1913, a decree was entered by the judge then presiding in the District Court of Arizona setting aside for the benefit of the intervenors named in the several petitions and for their benefit exclusively, such portions of the assets as might be collected by the receiver appointed in the original cause, paying expenses of this personally conducted and private litigation out of the stockholders fund, decreeing that such assets as might remain in the hands of the receiver above an amount sufficient to pay off in full without depreciation from any cause whatsoever, the money paid by intervenors into the Loan Association. Thereafter and subsequent to the adjournment of the term during which the decree of February 27th, 1913, was pronounced, to-wit, on the 12th day of March, 1914, the decree of February 27th was modified by the then presiding judge of the United States District Court upon the grounds as expressed in said decree shown in Record page 92.

It is readily apparent from this statement that the right of appellant not only to intervene in the original action but to appeal from the original decree and order of March 12th, 1914,

*Remain in the Trust*

rests upon the jurisdiction of the Court, upon the pleadings and the issues involved in the Clark suit and answers filed thereto, to enter the decree of February 27th. For the reasons and upon the authority hereinafter set forth, we earnestly contend that the decree of February 27th was beyond the right, power, authority or jurisdiction of the Court and then presiding judge to enter. In support of which statement we respectfully direct the Court's attention to the following

#### ARGUMENT AND AUTHORITIES.

The main suit was originally instituted by Charles W. Clark as a minority stockholder of the Arizona Mutual Savings and Loan Association in behalf of himself and all other stockholders of that association similarly situated, to the end that the transactions set forth in his bill of complaint between the Arizona Mutual Savings and Loan Association and the Arizona Trust Company

“be annulled and declared void and held for naught and to the end that an accounting may be had between the two defendants above named and between the defendant Loan Association and your orator, and others similarly situated \* \* \* that a Receiver be forthwith appointed to take possession of and to marshal the assets of defendant Loan Association \* \* \* to determine the amounts due and owing from defendant Loan Association to your orator and other stockholders similarly situated \* \* \* and for such other relief as to a Court of equity may seem



proper." Folios 105-107 inclusive. Transcript No. 2417. ;

That suit is admittedly a stockholders' suit, brought in equity only because of the impossibility of securing the assent of the directors of either company to the bringing of the suit, and is brought in a representative capacity, not as an individual, but in behalf of the corporation and of all stockholders in the corporation whose interests were jeopardized who were in any manner affected by the attempted consolidation of the Loan Association with the Trust Company; such consolidation it is alleged in the petition of Clark was void and beyond the

"right, power or authority of the defendant Loan Association or majority of the directors thereof" \* \* \* "in violation of his rights as a stockholder in defendant Loan Association and in violation of the obligation which said defendant Loan Association owed to all stockholders similarly situated, and in violation of the contract which then and now exists between your orator and other stockholders similarly situated, and the said defendant Loan Association." Folios 82 and 83. Transcript No. 2417.

It is further alleged in the complaint of Clark that the attempted transfer was

"in reality a fraudulent scheme improperly to perpetuate the existence of the defendant Loan Association after it had in fact, as heretofore alleged, *become and was insolvent* and was in fact unable to perform and dis-

charge its duties and obligations to its stockholders by reason of defendant Loan Association's insolvency, and by reason of the fact that said defendant Loan Association had suspended the operation of its said business and had conveyed or attempted to convey among its other assets, its good will to the said defeidant Arizona Trust Company and had in other respects *violated, broken and destroyed its contract* with your said orator above named *and other stockholders similarly situated.*" Folio 84. Transcript No. 2417.

The prayer of the Clark petition asks that the "transactions herein set forth as made between the defendants above named may be declared to be annulled and of no force and effect, and that a restitution of *all* of the assets of the Arizona Mutual Savings and Loan Association from the defendant Arizona Trust Company be adjudged and decreed, and that an accounting between both of the above named defendants be had and taken and an accounting between defendant Loan Association and your orator and other stockholders similarly situated be ordered and decreed." Folio 109. Transcript No. 2417.

"and that the affairs of Defendant Loan Association be wound up, its assets marshalled as aforesaid and distributed to those found to be entitled thereto." Folio 110. Transcript No. 2417.

We submit that the funds of the Loan Association constitute a trust fund in the hands of

those in control of its affairs for the benefit of those exclusively entitled thereto.

This is either a stockholder's suit, brought in a representative capacity for himself and all other stockholders similarly situated only because the corporation, for the reasons alleged in the petition is disqualified from suing, in which event and as would be the case if the suit had been in the name of the Corporation instead of a stockholder, the decree should have been in favor of the corporation and for the benefit of all of its stockholders, or

This is a suit brought by intervening stockholders, not in a representative capacity and not for the benefit of the corporation and stockholders, but for the redress of wrongs and the enforcement of rights not given to all stockholders; in this event and only in this event, plaintiff and intervenors in this action can be entitled to a decree for their personal benefit, in which other stockholders similarly situated did not share, or;

This is a creditors suit brought at the expense of and for the benefit of creditors, in which event such creditors as did not present their claims and share the expense of the litigation would not be entitled to the proceeds of the judgment.

If it is a stockholders' suit brought in a representative capacity, theoretically in the name of and actually for the benefit of the corporation, all stockholders whether assenting or non-assenting, whether guilty or innocent of participation in the acts of the corporate officers sought to be set aside and by the decree declared void, are bound by the decree for the suit is by the Corporation through its stockholders, not only

for all stockholders of the corporation but in effect is against the corporation itself, and it is apparent that a stockholder as a plaintiff cannot be held as bound by the terms of the decree and at the same time be precluded from sharing in the benefits.

Moreover the so-called final decree of February 27th, 1913, finds

“that at or about the time (meaning the time when the pretended transfer of assets was made by the Loan Association to the Trust Company) *the defendant Loan Association was insolvent* and unable to meet its obligations to its stockholders as said obligations were accruing.” Record page 5.

And further provides

“That each of said exchanging stockholders be and they hereby are *restored to their original position and status as stockholders of defendant Loan Association, and each of said exchanging stockholders is hereby deprived of his status as a stockholder in defendant Trust Company.*” Record p. 7.

We assert, in view of these findings, that a distribution of the assets collected by the Receiver cannot be made to any stockholder of the Arizona Mutual Savings and Loan Association upon any other basis than that the original complainant and intervening stockholders should pro rate in the assets so collected by the Receiver as their respective interests as stockholders may appear to have been “*in the insolvent Loan As-*



*sociation at the time of the alleged attempted and void transfer,"* for upon what theory may the Receiver be directed to disregard these two findings in the decree and to pay to certain stockholders a fixed and definite sum without such ascertainment?

To permit any stockholder suing in a representative capacity for the corporation and its stockholders to be paid in full the book value of his stock as has been done in the decree of February 27th, 1913, would be to disregard the fact that they were stockholders in the *insolvent* Loan Association and take from the pocket of those for whose benefit this stockholders' suit was instituted a sum of money sufficient to pay in full those stockholders who were his representatives in the bringing of the suit. It is in effect and in fact the entry of a personal judgment in favor of a few stockholders who assume to act for all, and against those stockholders who, relying upon the declaration of the complainant that he was bringing the suit in their behalf, rested secure in the belief that their representative would treat them fairly and justly; this personal judgment so entered in favor of complainant and intervenors and against the other stockholders personally and individually was without process or notice save that given to the corporation of which they were members and for which the suit was commenced, and this notwithstanding the fact that the contribution from the remaining and unpreferred stockholders comes from them as stockholders in an insolvent corporation to pay in full other stockholders in such insolvent corporation.

This decree was not within the issues of the

allegations of the Clark bill of complaint which it must be remembered were adopted in their entirety by all of the petitioning intervenors, but was so clearly without the issues submitted that equity and good conscience made its modification imperative to the end that all stockholders for whom the original bill of complaint was filed should not only be bound by the judgment but should participate in its benefits; that no one or more stockholders of an insolvent corporation should be preferred over other stockholders in such corporation or over creditors of the Loan Association, and that the stockholders of the Loan Association should be, to use the phrasing of learned counsel for the petitioner, "restored to their original status as Loan Association stockholders." The allegation of insolvency in itself precludes the possibility of the intervenors obtaining preference under the decree, because of the fact that if the Mutual Company was insolvent defendant stockholders would have a right to a pro rata only in the assets remaining, whereas the decree, notwithstanding the allegation of insolvency, purports to prefer the intervenors to the extent of paying their subscriptions without depreciation caused by insolvency.

THIS IS NOT A SUIT BROUGHT BY A DEFRAUDED STOCKHOLDER TO SET ASIDE A SUBSCRIPTION OF STOCK IN THE TRUST COMPANY, EXCEPT IN SO FAR AS THE SUIT IS BROUGHT TO DECLARE THE TRANSACTIONS BETWEEN THE TWO COMPANIES VOID AND FRAUDULENT AND REINSTATE STOCKHOLDERS OF THE LOAN ASSOCIATION TO

THEIR ORIGINAL STATUS IN SUCH ASSOCIATION BEFORE THE VOID AND FRAUDULENT TRANSFER OF ITS ASSETS.

“It is a well established rule of law that a stockholders’ suit to remedy a wrong done to the corporation must be in behalf of all of the stockholdtrs since they are all equally interested in the results of the suit. Accordingly the complainant must bring the suit in behalf of himself and such other of the stockholders as may care to come in.”

Cook on Corporations, 6th Edition, pp. 734, page 2426.

“An injury done to the stock and capital by negligence or defeasance is not an injury to such separate interest, but to the whole body of stockholders.”

Brickerhoff v. Bostwick, 88 N. Y. 52, 105 N. Y. 567; 1 N. E. 667.

Richmond v. Irons, 30 L Ed. 870.

Craig v. Gregg, 83 Penna St. 19.

Deviney v. Hart Coal Co., W. Vir. 68 S. E. 789.

It is held to be

“a fatal defect in the plaintiff’s petition both original and amended that it seeks no recovery on behalf of the corporation but seeks a direct recovery of damages to the plaintiff, the statement not entitling him to such recovery.”

Evans v. Brandon, 53 Tex. 56;  
 Howe v. Barney, 45 Fed. 668.

“Money or property recovered from directors or other persons in a suit in equity instituted by a stockholder on behalf of the stockholders, belongs to all of the stockholders and not the complaining stockholder; it goes to the corporation, the decree must be for the benefit of the corporation and not for the complaining stockholders.”

Wallace v. Lincoln Savings Bank, 89 Tenn. 630;

Landis v. Sea Isle, etc., 53 N. J. Eq. 654;

Loewenstein v. Diamond Match Co., 94 N. Y. App. 383;

Thompson on Corporations, 6th Ed., pages 4490-91, 4560;

Thompson vs. Stan, 20 N. Y. Sup. 317;

Thompson on Corporations, page 4566.

The relations one with the other of stockholders of a Loan Association are peculiar and differ from the relations of stockholders in other corporations, in that the interest of each stockholder in such Loan Association is mutual and the value of each share of stock depends upon the mutuality of the contract and upon the observance or non-observance of each other stockholder of his contract of subscription to stock in such an association. This value is influenced by the fact of whether or not, because of the failure to make stated payments any stockholders forfeit their interest in the association, and the amount of money which may have been paid before such



forfeiture comes to the Treasury of the company for the increasing of its capital under the head of "lapses." It depends also and varies because a borrowing stockholder may not only forfeit the amount which he has repaid on the sum borrowed, but the security as well, and by diminishing the number of those entitled to share in the assets and earnings, at the same time add to the value and amount of such assets.

"If as a result of the suit money is recovered for the benefit of the company it goes into the corporate treasury as any other funds of the company, and inures to the benefit of all shareholders, those assenting to the suit and those dissenting, those innocent and those guilty. Although this may seem to outrage ones sense of propriety, yet in no other way can legal principle be satisfying and in no other way can so near an approach to perfect justice be attained. In such a case, however, where the money is eventually to be distributed among the share holders the court may order immediate payment to the plaintiff of his share or proportion."

Machen 1185—Cases cited.

"A shareholders' suit is brought for a wrong to the corporation which but for exceptional circumstances would be the only proper plaintiff. The complaining share holder should sue as a representative of the aggregate right of the share holders; that is to say, on behalf of himself and all other share holders similarly situated, and hence a

bill filed on his own behalf alone would be dismissed.

Machen, pp. 1172—Cases cited.

“The bill may be maintained by one share holder on behalf of all the others, although some of the latter have acquiesced in the transactions complained of and would therefore be barred from appearing as plaintiffs themselves.”

Machen, pp. 1172.

“Defects in the process or in service constitute the most unquestionable ground for vacation of judgment after the lapse of the term. If there is an entire absence of service of process, and this fact appears by the record or by such evidence as under the practice of the court where the judgment is entered is competent it may be vacated on motion at any time. Though process was served in some manner or was defective in form and the judgment is not therefore absolutely void, it will generally be vacated on motion. While it is universally conceded that a judgment void for want of jurisdiction over the person of the defendant may be vacated on motion, irrespective of the lapse of time, there is a wide diversion of opinion as to what judgments are void for this reason and as to whether the motion to vacate a judgment is a direct attack upon it so as to warrant the reception of evidence not found in the record, and perhaps inconsistent with that which is to be found there.”

1 Freeman on Judgments, 4th Ed. pp. 97-98.  
 Cases cited: People vs. Green, 74 Cal. 103.  
 People vs. Mullan, 65 Cal. 396.  
 Ladd vs. Mason, 10 Ore. 308.  
 People vs. Pearson, 76 Cal. 403.  
 Ex Parte Krenshaw, 15 Peters 119.

“If complainant stockholders sue for the restoration of assets of the corporation which have been diverted by its unfaithful directors into their own hands or into the hands of stockholders or strangers in breach of their duty or trust, neither those assets nor any proportion of them can be restored to the complaining stockholders, but recovery must be had in behalf of the corporation, and a receiver will in a proper place be appointed to take charge of and administer them.

Thompson on Corporations, pp. 4560-4490  
 and 4491.

Thompson vs. Stanley, 20 N. Y. Sup. 317.

“It will frequently happen that a majority of the shareholders are in a fraudulent conspiracy against the rights of the minority. The minority or one of the minority suing for himself and others in like situation with him may file the bill. Where the bill is thus filed it is not necessary that the share holders should be made party by name, nor is it an objection that some of the share holders have become adversely interested.”

Thompson on Corporations, pp. 4566.

“Where the action is brought to undo frauds already committed and to restore to

the corporation assets wasted, the action does not proceed in right of the stockholders but it proceeds in right of the corporation, and consequently whatever is restored accrues to the corporation, and the law at once attaches to it the character of a trust fund for the creditors of the corporation first, and for its stockholders next, in which all are to share ratably and in respect of which no one gets a preference over the other, not even the stockholder who takes upon himself the burden of prosecuting the suit which results in its restoration."

Thompson on Corporations, pp. 4491.

Slattery v. St. Louis & T. Co., 94 Mo. 217,  
4 S. W. 79.

### COUNSEL FEES.

We had insisted that this suit is a stockholders' suit brought in a representative capacity by the original complainant for himself and stockholders similarly situated, being stockholders of the Mutual Loan Association and as such entitled to all of the rights, privileges and property as a stockholder in defendant Loan Association, including the right of complainant and intervenors to participate in all of the assets of defendant Loan Association and upon the distribution thereof to receive such, if any, property as may remain undisturbed as the property of defendant Loan Association after defendant Loan Association had discharged all of its obligations to its stockholders in paying off and discharging such stock therein as may have matured and become due and payable from said de-



fendant Loan Association to the members entitled thereto. That complainant recognized the necessity of suing in such capacity and for such purposes is evidenced by the contents of Paragraph IV of his petition, folio 73. Transcript No. 2417. /

In this capacity and seeking this relief the rule is well established that a stockholder being successful in the litigation should be allowed counsel fees out of the fund recovered; that is to say, all the stockholders of the corporation receiving the benefits of the litigation should share in the payment of the expenses incident thereto.

It was doubtless upon this theory and under this rule that the expenses of the litigation were sought to be allowed in the decree of February 27th, 1913. Nor can we believe it was ever the intention of the learned Judge presiding in the Court below on this date that counsel fees were to be paid out of the common fund belonging to all stockholders without requiring the original complainant and intervening stockholders to pro rate in such payment. That this has been done is evident from the terms of the decree of February 27th, 1913, allowing to each intervening stockholder the amounts alleged by each intervenor to have been the total amount paid on account of the purchase price of stock.

If this is a stockholders' suit brought for the benefit of all stockholders, this expense should be paid out of the stockholders' common fund, thus reducing the share of each stockholder in the distribution of the remaining fund by an amount proportioned to the amount he has paid in. If this suit is a suit brought by individual

stockholders, having an individual right accruing to them as distinguished from stockholders not named as intervenors, it seems too clear for argument that an amount should have been set aside from the fund aggregating the total amount paid in by all intervening stockholders, out of which fund recovered for their individual benefit they should be compelled to pay the expenses of litigation. Any other method would be equivalent to a personal action by the intervenors and the judgment against such non-intervening stockholders to be paid by them not only in the full amount, but including counsel fees (presumably due on account of individual contracts) as well as the ordinary expense of litigation, and this without reference to the rights of holders of matured stock, which matured stock as noted by reference to the bill of complaint above referred to is by Clark himself recognized as having a priority of lien upon the fund recovered and for which Clark sets up no claim. Folio 73-74.

We do not wish to be understood as contesting the amount of the decree of February 27th, 1913, allowed to the able and distinguished counsel who up to this date had participated in this litigation, save upon the ground that such compensation should not and cannot be allowed except upon the theory that if allowed out of the common fund belonging to the corporation, stockholders of the corporation in whose name and for whose benefit the decree was rendered should not be compelled to participate in the payment of this compensation and be denied the benefits of the decree. We assert that there is a complete unanimity of authority that costs payable

by the complaining stockholders are payable by them per capita and not pro rata, according to the amount of stock held by each.

Edwards vs. Bay State, etc., 130 Fed. 242.

It is stated in Cook on Corporations, 6th Ed., to be the rule that

“Inasmuch as the suit is for the benefit of all of the stockholders, and inasmuch as the results of the suit belong and go to the corporation, it is right that the expenses of counsel fees and other disbursements of the suit should be paid by the corporation, provided the suit so instituted is successful. The proceeds of a stockholders’ suit belong to the corporation, less a reasonable allowance for the plaintiff for his costs, disbursements and attorneys’ fees.”

Cook on Corporations, 6th Ed., Paragraph 879, page 3160-61.

Citing Fox v. Ehle, 108 Cal. 475.

Meeker v. Winthrop Iron Co., 17 Fed. 48.

Trustees v. Green, 105 U. S. 527.

Central R. R. Co. v. Pettus, 113 U. S. 116.

Forrester v. Boston Co., etc., 74 Pac. 1088.

4 Thompson on Corporations, Para. 4491.

In view of the fact that the decree of February 27th, 1913, allowed to counsel for the petitioner a fee to be paid out of the stockholders’ common fund, thus recognizing the suit was brought for all of the stockholders, and not for those of a class, we deem the following quotation

from the opinion in *Lamar vs. Hall*, 129 Fed. 79-83, to be particularly applicable to the facts of the case at bar, as follows:

“It may be stated as a general and unquestioned principle that each client should compensate his own solicitor and that an attorney cannot make another person his debtor by voluntarily rendering services in his behalf without his express or implied consent. The cases which allow compensation to attorneys out of a trust fund are not in conflict with this principle, but are founded upon it, for they depend upon the principle of agency, the actual plaintiff being the representative of the beneficiary of the trust \* \* \* only jointly interested with others in trust property who in good faith maintains for himself and others interested like him, the necessary litigation to save it from waste and to secure its proper application is entitled to the reimbursement of his interest *as between solicitor and client out of the fund to be administered.*”

The fund to be administered in the case at bar is as we have before stated, either first the fund set aside in a sufficient amount to reimburse intervenors to the full extent of the amount by them paid in upon their stock subscription, or second, it is the common fund in which all stockholders, whether participating or non-participating, guilty or innocent of the acts complained of, are interested to the same extent as is the petitioner who sued in a representative capacity.

By this decision the Court was without juris-



diction, except upon the theory that this was a stockholders' suit brought for the benefit of all stockholders of the Loan Association, to allow counsel fees out of the general fund in fulfillment of an implied or expressed contract made by intervening stockholders to pay counsel out of the fund which might be recovered for their personal benefit.

In further support of our contention that the Court was without jurisdiction to enter the decree of February 27th, 1913, we refer to the case of *Sullivan v. Stukey*, 86 Fed. 491; *Lewis v. Clark*, 129 Fed. 570, and *Toll v. American, etc., Society*, 61 Fed. 446.

Before quoting further from these cases, attention of this Court the admission that the Loan Association was on the date of the attempted transfer of its assets, insolvent; we at this time again request the Court to consider the anomalous position occupied by a stockholder who claims the right under a decree not only to have expenses and counsel fees of his private litigation paid by other stockholders in the Loan Association, but, without regard to the rights of stockholders whose stock has matured and who have thus become creditors instead of stockholders (as admitted by Clark, the original petitioner), and other creditors, if any there might be, and with regard to the possible contingency of some of the intervenors having been borrowers from the stockholders' fund, to be paid the full amount of his investment in an admittedly insolvent corporation.

Returning to the cases cited, the case of *Sullivan v. Stukey* supra is a direct contradiction of this asserted right in that it holds that under

any of the three contentions made in behalf of the rights of stockholders of an insolvent building and loan association all stockholders are on an equality. *Lewis v. Clark supra*, while sustaining the statement that the insolvency of a Loan Association terminated the contract between it and its members, also contains the statement quoted from page 573 that

“The share holders in associations of this character are not in the ordinary sense creditors, and if deemed creditors in any sense they are necessarily subject to all equities existing between themselves.”

The case of *Toll v. American, etc., Society, supra*, in a concise and full opinion rendered by Judge Grosseup involving the direction of that Court regarding terms on which the borrowers of the association might repay their loans and also the claims which the Receiver should advance on like actions in case of compulsory foreclosure contains the following language:

“The first question is whether he (the stockholder) is entitled to a credit for the amount of the assessments paid upon his stock. I think not. Such a credit practically would be paying par on his stock and *a preference over other stockholders to which clearly he is not entitled.*”

As a matter of fact, while the original suit was by a perfect bill of complaint commenced by Clark, the original complainant, suing as a stockholder for the benefit of all stockholders of the

Loan Association who were injured by the void, fraudulent and attempted transfer by the Association to the Trust Company of its assets, each intervening petition, word by word and step by step departed from the result originally sought to be obtained, until by the so-called final decree of February 27th, 1913, the proceeding was transformed from a suit brought by the Corporation for the benefit of its stockholders, to a suit brought by stockholders as creditors for the redress of a private wrong and the enforcement of a private right claimed to be not common to other stockholders.

So far as it may be determined from the pleadings and from the decree of February 27th, 1913, the only justification for this departure is based upon the claim that because those stockholders not named as intervenors did not permit their names to be used, they should for this reason be deprived of their status as plaintiffs and of their right to share in the benefits obtained by the decree. Not only is this true but they are burdened with the payment of several thousands of dollars expended in the employment of eminent counsel and unnecessarily expensive litigation for the individual benefit of those who at the most were merely formal parties to the suit.

The intervenors in this suit adopted all of the averments of the original bill of complaint. The intervening petitions were unnecessary except to confer upon the intervenors the right to assist in the control of the litigation. Especially is this true in the case at bar where the intervenors by adopting the allegations of the bill of complaint filed by Clark align themselves as plaintiffs in the action.

The office and the rights of an intervenor in support of a proceeding in equity are well stated in the case of *Brickerhoff v. Bostwick*, 1 N. E. Rep. 667. This was an action commenced by plaintiff as a stockholder suing in his own behalf and for the benefit of other stockholders of a national bank in which other parties intervened. While this case is cited by us for the purpose of defining the rights of intervenors it is also applicable to the claim made by petitioner that all stockholders of the Loan Association not intervening are barred by laches from claiming the right to participate in the decree, in that the case holds that the action being brought in a representative capacity, all stockholders as well as the nominal plaintiff were before the Court, and unless the action of the original plaintiff was barred by laches, the action on the part of those stockholders similarly situated would not be barred.

The case of *Brickerhoff v. Bostwick*, 1 N. E. 667, contains the following language:

“The action was commenced by Theodore Brickerhoff, suing on his own behalf and for the benefit of the other stockholders of the bank; and therefore, for the purpose of the statute of limitations, the action must be treated as if all the stockholders were plaintiffs. The action is really the action of all the stockholders, as it was necessarily commenced in their behalf and for their benefit. It could not have been commenced by one stockholder for himself alone. It is true that at any time before judgment the original plaintiff, before the others were made par-



ties, could have discontinued the suit, or could have settled his individual damages with the defendants, and have executed a release which would have been effectual as to him. But if he had prosecuted the action to judgment, then the judgment would have been for the benefit of all the stockholders, and he would then have ceased to have control over it, because the rights of the other stockholders would at once have attached thereto. The bringing of the action by this original plaintiff did not prevent the other stockholders from bringing similar actions; but the moment a judgment should be recovered in one action for the benefit of all the stockholders, the proceedings in all the others would be stayed. *Innes v. Lansing*, 7 Paige, 583. In this case, therefore, it was not necessary that the other plaintiffs should have been joined as nominal plaintiffs. The suit could have gone to judgment without their presence as nominal plaintiffs, but the judgment would have been just as effectual and just as beneficial for them as if they had been actually named as parties plaintiff. The suit having been commenced for their benefit, in which full and adequate relief could have been given to them, their rights would not have been barred by any lapse of time if they had not come in as plaintiffs. There was no purpose in their becoming nominal plaintiffs, except that they might have some control of the action, and thus be present to protect and secure their rights, and to prevent a discontinuance of the action by the original plaintiff."

## JURISDICTION OF THE COURT TO ENTER DECREE OF FEBRUARY 27.

“It is a general rule, well established that after a term has ended, all final judgments and decrees of the Court pass beyond its control unless steps be taken during that term by motion, or otherwise, to set aside, modify or correct them; and if errors exist they can only be corrected by such proceedings by a writ of error or appeal as may be allowed in a court which by law can review the decision. So strongly has this principle been upheld by this Court that while realizing there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered, and this is placed upon the ground that the case has passed beyond the control of the court.” *Bronson v. Schulten*, 104 U. S. 410, 26 L. Ed. 797.

To this general rule there are well recognized exceptions to the effect that while the general rule is applicable to cases at law a judgment or decree which under the general rule has become final by the expiration of the term, may be modified after the term and purged of errors or reversed by proceedings for error in fact. The exception to the rule is stated by Mr. Justice Curtis in the case of *Hendrickson v. Henckley*, 17 How. 443, 15 L. Ed. 123, as follows:

“A court of equity does not interfere with judgments at law unless the complainant has

an equitable defense of which he could not avail himself at law because it did not amount to a legal defense at law which he was prevented of availing himself of by fraud or accident unmixed by negligence of himself or his agents."

Upon the question of the jurisdiction of the Court to enter the decree of February 27th, 1913, the position taken by respondent is as follows:

A Court only acquires jurisdiction according to the established modes covering the class of case to which it belongs, and an erroneous judgment can be attacked collaterally. One not a party to a judgment cannot appeal therefrom and it follows that such a one is not bound by the judgment because of the fact that he is not a party. Where one is sought to be bound by a judgment it must appear that he is a party, and if by the terms of a judgment it is sought to bind him by it he is a necessary party and as such should be brought into Court in order that he may have his day and have his rights litigated. Bare notice or actual knowledge of the pending litigation is insufficient, for where a party is necessary to the adjudication of a cause he must be brought into court by a process of the court. Under the decree in this case the judgment being for the personal benefit of the intervening stockholders and against the interests of those stockholders not intervening, we submit that such non-intervening stockholders were necessary parties not brought before the court by process or at least so far as they are concerned, the decree of February 27th cannot be consid-

ered a final decree because it could not be adjudicating their rights for the purpose of rendering a final judgment against them without their presence in court; as to such non-intervening stockholders the decree of February 27th, 1913, is interlocutory; the proceeding in this cause being equitable and the court having taken possession of the property for the purpose of conserving the interest of the petitioners and those similarly situated, an order made by the court which does not so conserve the interest of all stockholders is made without jurisdiction. The petition is based upon equitable rights, the relief sought is equitable, the judgment of the court does not follow equity by preferring a portion of the stockholders of the same class as against the remainder. The judgment is in law rather than in equity and is therefore entered without jurisdiction.

“A court has no power to render judgment respecting a matter not submitted to it for decision though such judgment is pronounced in an action involving other matters which have been submitted to it for decision and over which it has jurisdiction.” Freeman on Judgments, 4 Ed. para. 120, page 185.

In an opinion by Mr. Justice Brewer the rule is stated to be that:

“A judgment for the recovery of the possession of real estate rendered in an action whose pleadings disclose only a claim for the possession of personal property cannot be sustained, although personal service was made upon the defendants.”



Reynolds vs. Stockton, 140 U. S. 254, 35 L. Ed. 464.

By the same reasoning the Court was without jurisdiction to render the decree of February 27th, because of the fact that the suit was brought by Clark in a representative capacity for all stockholders similarly situated; that is to say, for all stockholders whose rights under the contract with the Loan Association had been impaired by the void, attempted transfer of the assets of the Loan Association to the Trust Company, and the decree purports to adjudicate the rights of petitioners and intervenors in their capacity as individuals, taking away from the corporation itself and stockholders similarly situated with the intervenors the benefits of the judgment.

The case of Reynolds v. Stockton *supra* involved the jurisdiction of the Court in a stockholders' suit brought for the purpose of securing the reconveyance of personal property from one corporation to the complaining corporation, to enter a judgment so affecting the issues presented by the petition as to adjudge also the return of all real property. It was held in this case that the Court had no jurisdiction to enter a judgment affecting the real property because such an adjudication was not within the issues of the suit and

“the rule is universal that where defendant appears and responds only to the complaint as filed and no amendment is made thereto the judgment is conclusive only so far as it determines matters which by the pleadings

are put in issue." \* \* \* \* "The inquiry is, had the Court jurisdiction in the extent claimed? Jurisdiction may be defined to be the right to adjudicate concerning the subject matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and third, the point decided must be, in substance and effect, within the issue. That a court cannot go out of its appointed sphere and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment."

In this case the language of Mr. Justice Campbell in *Washington Hackett Co. v. Sickles*, 65 U. S. 333, 16 L. Ed. 650-53, is quoted with approval as follows:

"The essential conditions upon which the exception of the *res judicata* becomes applicable are the identity of the thing demanded, the identity of the cause of the demand and of the parties in the character in which they are litigants."

Applying this rule to the case at bar we submit that the decree of February 27th, cannot

bind the non-intervenors because of the fact that while there was an identity of the demand and of the parties in the character in which they were litigants as set forth in the petition of Clark there was no such identity of demand or of the parties litigant set forth either in the petition of the intervenors or in the judgment rendered for their especial and individual benefit.

To the same effect the rule is even more vigorously stated in *U. S. v. Walker*, 109 U. S. 267, 27 L. Ed. 927, as follows:

“Although a court may have jurisdiction over the parties and the subject matter, yet if it makes a decree which is not within the powers granted to it by the law of its organization, its decree is void.”

Citing with approval the language in the well known case of *Windsor v. McVeigh*, 93 U. S. 274, 23 L. Ed. 914, in which Mr. Justice Field after a review of the cases bearing upon this subject announced the decision of the Court as follows:

“The doctrine invoked by counsel that when a Court has once acquired jurisdiction it has a right to decide every question which arises in the case and its judgment, however erroneous, cannot be collaterally assailed is undoubtedly correct as a general proposition but is subject to many qualifications in its application. It is only correct when the Court proceeds after acquiring jurisdiction of the cause according to the established modes covering the class to which the case belongs and does not transcend in the extent

or character of its judgment the law which is applicable to it.

“To a bill for the dissolution of a corporation and an accounting filed for the benefit of a single stockholder not on behalf of the rest, the other stockholders or their representatives must be made defendants.”

Fosters Federal Practice, 4th Ed., p. 342.

Citing *Watson v. U. S. Sugar Refining Co.*,  
68 Fed. 769.

The case at bar among other things is an action for an accounting. The decree of February 27th directs an accounting. The original bill of complaint prayed for an accounting between the Loan Association, the Trust Company and stockholders of the Loan Association similarly situated with the complainant. In so far as the decree purports to direct an accounting for the benefit of all stockholders it is within the rule laid down in Fosters Federal Practice, *supra*. In so far as the decree purports to direct an accounting only as between the intervening stockholders and not on behalf of the rest, other stockholders or their representatives, under the above rule, must have been made defendants. This not being done the other stockholders affected by the decree have not had their day in court.

[To the effect that a cause of action where the relief sought is personal as distinguished from general relief sought on behalf of all stockholders is a misjoinder to such an extent as will not permit a judgment in favor of the complaining stockholder not participated in by the other stockholders citation is made to *Metcalfe v. Amer-*



ican School Furniture Co., 108 Fed. 909. In this case a minority stockholder in the corporation sued in behalf of herself and other stockholders similarly situated to set aside an alleged transfer of property of the corporation in pursuance of conspiracy between its officers and the transferee where it is alleged the corporation on demand has refused to bring suit and also seeks the recovery of treble damages under the anti-trust act. It is declared to be multifarious, since such damages are only recoverable in an action at law by the plaintiff as an individual and not as a stockholder, while the relief prayed for is in behalf of the corporation and if granted would inure to the benefit of all the stockholders.

“In the absence of fraud or collusion an intervening defendant can ordinarily set up no defense of which the original defendant could not have availed himself, nor can an intervening complainant contest the general object of the suit.”

Fosters Federal Practice, 4th Ed., p. 673.  
Citing *Forbes v. L. P. and Pacific Railroad*,  
2 Woods, C. C. A. 323.

#### ALL STOCKHOLDERS OF ARIZONA MU- TUAL BELONG TO SAME “CLASS.”

“Upon general principles if the party named as plaintiff who sues in behalf of himself and others fails in his suits, those whom he represents must also fail, for the rights of those represented can rise no higher than

those named as plaintiffs.” *Quinlin v. Meyers*, 29 Ohio St. 500-10.

Conversely it must be true that the rights of intervenors are dependent upon the relief prayed for in the original suit, professedly in this case being brought for Clark and all other stockholders similarly situated; the intervenors would be entitled to no other relief or to any higher relief than might have been granted had the suit been prosecuted in the name of Clark as nominal plaintiff on behalf of and for the benefit of stockholders in the Loan Association similarly situated. By the phrase “similarly situated” is meant not those stockholders who are the nominal parties to the suit but all stockholders who at the time of the commencement of the suit were similarly situated in their contractual relations with the Mutual Company as was Clark. If in this case the directors of the Loan Association, fraudulently and collusively combining with the directors of the Trust Company entered into a contract and agreement which from its inception was void as being a breach of the trust relation imposed upon them by virtue of their offices as directors, the entire transaction as is alleged in the bill became void, not only as to Clark but as to all who were stockholders in the Loan Association at the time of the alleged, attempted fraudulent transfer. From this point of view there could be no such thing as “assenting” or “non-assenting” stockholders because of the legal impossibility of an assent by either class of stockholders to an act void in law. Indeed we believe it may be stated as a rule which will not be denied by petitioner that his stand-

ing in this court of equity rests upon the statement contained in the pleadings that the suit is brought in a representative capacity for the benefit of the corporation and its stockholders.

Upon the authority of a statement made by counsel for intervenors in one of the briefs submitted during this litigation filed October 16th, 1912, marked for identification in the office of the Clerk of the U. S. District Court, file "No. 53."

"the admitted facts show that the acquisition of the assets of the Loan Association by the Trust Company was and is illegal. This in effect has been twice judicially decided in this cause, once by Judge Morrow and once by Judge Sloan."

This statement by counsel for petitioners is sustained by the decree of February 27th, in which it is found that the entire transaction between the directors of the Loan Association and the directors of the Trust Company was fraudulent and void. The petition of Clark upon its face is a disclaimer of any voluntary participation of any stockholder of the alleged fraudulent acts. There is no claim that the acts alleged to be fraudulent were voidable. On the contrary, the distinct allegation is that the transfer of the stock of all Loan Association stockholders was beyond the power of the Loan Association to effect under the contract between the stockholders and the Loan Association. That such attempted transfer was in breach of the trust relations which the directors of the Loan Association bore to its stockholders and was accomplished by such fraudulent misrepresentations as to render the transfer void ab initio.

The true test as to whether a suit should be brought by a stockholder in his individual right or in a representative capacity is said to be as follows:

“Is the complainant affected only as every other shareholder is affected, or is he affected in some manner peculiar to himself.”

Machen on Corporations, para. 1152.

Converse v. United Shoe Co., 185 Mass. 422;  
70 N. E. 444.

Miles v. N. Y., etc., Ry. Co., 176 N. Y. 119;  
68 N. E. 142.

Lawrence v. Curtis, 191 Mass. 240.

Wells v. Dane, 101 Maine 67; 63 Atl. 3242.

Bigelow v. Calumet Mining Co., 155 Fed. 869.

In the case at bar under the facts pleaded, the interest of all stockholders of the Loan Association are affected equally. Any transfer of any portion of the assets of the Loan Association lessening the value of the stock of one stockholder must have a like effect upon the stock of every other stockholder and this whether the holder of stock assented or refused his assent to such transfer. Any misappropriation of the funds of the Loan Association by its officers had an equal effect upon the value of all stock. Every act of mismanagement entailing an unwarranted expenditure of money affected the rights of all stockholders and the value of all stock and in no manner are the intervenors affected except as every other shareholder is affected, unless indeed as results from the decree of February 27th, 1913, the shares of the intervening stockholders are unwarrantably and unduly en-



hanced in value by a distribution of all of the assets in the corporate fund to the intervenors and to the exclusion of the other share holders.

[The original action commenced by Clark is predicated upon the assumption that the attempted transfer of assets from the Loan Association to the Trust Company was void ab initio and deprived him and other stockholders of the Loan Association without respect to the class of stock held by them, of their rights as stockholders in the Association.

The intervening petitions attempt to place petitioners in a class by themselves resting only upon the fact either that they never exchanged their stock for stock of the Trust Company, or that having exchanged they had rescinded their action. The intervenors pray for and are granted relief in an action accruing to themselves personally, arising out of an action necessarily based upon the claim that the entire transaction was void. We submit that the cause of action attempted to be sued upon by the intervenors results in a joinder of a cause of action accruing to themselves personally with the cause of action brought by Clark on behalf of the Company and other stockholders against the same parties defendant. That this cannot be done and the Court was without jurisdiction to enter a decree in favor of the intervenors personally and against the corporation and non-intervening stockholders. That the authority to enter such a decree, the effect of which as we have before stated is a personal judgment in favor of some stockholders as against the other stockholders in a suit against the same defendant corporation, must rest upon the issuance of a valid process

giving to such non-intervening stockholders their day in court. That such a joinder of causes of action is multifarious and cannot be maintained in a Court of Equity. In support of this statement we cite:

Cook on Corporations, 6th Ed., para. 739,  
pages 2462-2463. |

Whitney v. Fairbanks, 54 Fed. 985.

Farrow v. Holland Trust Co., 74 Hun. 585.

Metcalf v. American School Furniture Co.,  
108 Fed. 909.

APPELLANT IS NOT A PROPER PARTY  
TO THE ORIGINAL CAUSE AND HAS NO  
RIGHT OF APPEAL FROM ANY ORDER  
OR DECREE MADE IN SAID CAUSE, EX-  
CEPT THE RIGHT TO APPEAL FROM THE  
ORDER MADE MARCH 12, 1914, DENYING  
IT RIGHT TO INTERVENE AND DISMISS-  
ING ITS PETITION.

If the decree of February 27th, 1913, is sus-  
tained it will be admitted by appellee that the  
order denying the right of appellant to intervene  
is error. If on the other hand the decree of  
March 12, 1914, is sustained appellant is not  
only not injured by the decree, but its rights as  
a creditor of the Arizona Trust Company are  
fully protected. Under the decree of February  
27th, after the setting aside of sufficient assets  
to pay in full claims of individual plaintiffs  
named as intervenors, stockholders not named  
as intervenors are compelled to retain their  
status as stockholders of the Arizona Trust Com-  
pany, and all assets and funds in excess of an

amount necessary to pay the claims of intervenors is decreed to be the fund and assets of the Arizona Trust Company. The Farmers and Merchants' Bank as a judgment creditor will then, according to the prayer of its petition and by the sustaining of the decree of February 27th, be given a preferred creditors lien, to the exclusion of the claims of all other stockholders of the Mutual Savings and Loan Association, upon such funds as are decreed to remain in the hands of the Trust Company, and thus not only will the stockholders of the Loan Association be deprived of the relief to which they are entitled under the issues presented in the original Clark petition and intervening petitions, but the Farmers and Merchants' Bank will be paid out of the fund which under the decree of February 27th and the issues raised in the pleadings has been fraudulently, unlawfully, by the most criminal collusion of the Directors of the Loan Association and the Trust Company and by acts beyond the power of the directors of the Loan Association to effect, transferred from the control of the stockholders of the Loan Association to the Trust Company.

If on the other hand the decree of March 12th shall be sustained, the rights of the Farmers and Merchants' Bank are specifically and fully protected, in that claimants properly creditors of the Arizona Trust Company by reason of any dealings had with the Trust Company in respect to any funds which may properly remain in its hands after the defrauded stockholders of the Loan Association shall be satisfied, may present their claims to the master in chancery for allowance as claims against the Trust Company,

which claims may by the terms of this decree be paid out of any funds which may so properly remain in the Trust Company. (Record, pp. 92, 98.)

The claim made by appellant that it has been injured because of a denial to it of the opportunity to prosecute various persons named in its petition as liable to contribution to a fund to be collected by the receiver, is without weight when it is considered that under the decree of March 12th (Record p. 97) it is ordered

“That the standing master report on the priorities or equities of all persons claiming to be interested in the property of the Loan Association in the order which the same are to be paid out of the assets of said Loan Association.”

And

“It is further ordered that the master report what are the rights of said Loan Association in any assets now in the hands of persons not parties to this suit, and whether or not the same can be recovered from the parties to whom they were transferred.”

Although the statement about to be made is necessarily outside the record in this case, we deem it permissible and necessary to direct attention to the fact that prior to this appeal the master appointed under the decree of March 12th took active steps to perform the duties imposed upon him by this decree and that all activities were summarily stopped by this appeal for the very good reason that neither the Re-



ceiver nor the Master could properly hazard the chance of an order being made in this appellate proceeding denying his right under the terms of the decree of March 12th of incurring the considerable expense which would be necessary in the conduct of hearings which would become imperative in the fulfillment of duties imposed upon him by this decree.

As a matter of fact except for this appeal the Master and Receiver were proceeding in the performance of the very duties which by the prayer of the petition of intervenor and appellant he was required to perform. That is to say, he was assuming the right to collect the properties and assets of both defendant companies for the benefit of petitioner and of other judgment creditors of the defendant Trust Company and for the benefit of all those having claims of any kind or character against the defendant Trust Company. (Record p. 68.)

#### THE DECREE OF MARCH 12, 1914, IS APPEALABLE.

We are agreed with counsel for appellant that the decree of March 12, 1914, is appealable. Not because as is stated in appellant's Brief that the decree is a nullity, but because it is a final adjudication of the rights of all parties concerned *who were proper parties to the suit and whose rights and interests were affected by the decree*. Appellant is by the order made on March 12th granted an appeal from the order denying him leave to intervene (Record p. 100), although appellant is denied the right to appeal from the judgment because, as we have endeav-

ored to show, it was not a proper party to the original cause. With this statement we are prepared to admit contentions of appellant contained in its Brief, pages 10, 11, 12, 13, 14 and 15. But we do deny that plaintiff has been injured within the scope and purview of the case of Credits Commutation Co. vs. United States, 91 Fed. 573, 177 U. S. 315-316, and other cases cited on page 18 of its Brief. Neither do we agree with counsel in his statement contained on page 18 that

“It has uniformly been the practice in the Federal Courts to file creditors’ bills and bills of the nature thereof as a matter of right without leave of the court.”

If this is a creditors bill it should, under the decree of February 27th, and especially under the decree of March 12th, be submitted to the master. If the master refuses without just ground to bring the actions suggested to be brought as in appellants bill for intervention set forth, appellant has ample recourse for the protection of its rights by noticing to the Court this dereliction of duty on the part of the receiver and master.

This is a bill in intervention founded upon the assumption that rights of appellant had by the decree of February 27th become vested rights. The allowance or disallowance of a bill in intervention is stated to be discretionary with the Court and an order denying leave to intervene is not regarded as a final determination of the merits on which the intervention is based, but leaves the petitioner at full liberty to assert his

rights in any other appropriate form of proceedings.

Credits Commutation Co. v. United States,  
supra.

The determination of the question as to whether or not appellant is injured by denial of leave to intervene depends primarily upon whether or not it shall be permitted to assert such right under the decree of February 27th. In Credits oCmmutation Company, supra, the rule is stated as follows:

“Such an order not only lacks the finality which is necessary to support an appeal, but it is usually said of it that it can not be refused because it merely involves an exercise of the discretionary powers of trial courts. It is doubtless true that cases may arise where the denial of the right of a third party to intervene therein would be a practical denial of certain relief to which the intervenor is fairly entitled and which he can only obtain by an intervention. Cases of this sort are those where there is a fund in court undergoing administration to which a third party asserts some right *which will be lost in the event that he is not allowed to intervene before the fund is dissipated*. In such cases an order denying leave to intervene is not discretionary with the Chancellor and will generally furnish the basis for an appeal since it finally disposes of the intervenor’s claim by denying him all right to relief.”

We submit and close this Brief with the

statement that if the Court had jurisdiction to enter the decree of February 27th, 1913, appellant had a vested right to the extent of his claim against all funds remaining in the Trust Company in excess of the amount necessary to pay intervening stockholders named in the decree of February 27th.

If that decree was entered without jurisdiction, the rights of appellant are fully protected under the decree of March 12th, in that not only are the funds in court undergoing administration to which appellant asserts a right not lost, but on the contrary, will be conserved for the benefit of the appellant and other creditors of the Trust Company to the extent of any fund that may remain properly belonging to the Trust Company. If the funds collected by the receiver are under the authorities referred to in this Brief properly the funds of the defrauded stockholders of the Arizona Mutual, it is apparent that appellant, being a creditor only of the Arizona Trust, and asserting no claim as against the funds of the Arizona Mutual, is not entitled to payment out of the funds belonging to the Mutual.

Respectfully submitted,

GEORGE J. STONEMAN,  
REESE M. LING,

Phoenix, Arizona.

Solicitors for Arizona Mutual Savings and Loan Association and Arizona Trust Company and Sims Ely, as Receiver for the Arizona Mutual Savings and Loan Association and Arizona Trust Company, Appellees.





In the  
**United States**  
**Circuit Court of Appeals**  
For the Ninth Circuit

FARMERS AND MERCHANTS'  
BANK, PHOENIX, as Intervener,  
Appellant.

vs.

ARIZONA MUTUAL SAVINGS  
AND LOAN ASSOCIATION and  
ARIZONA TRUST COMPANY  
and SIMS ELY, as Receiver for  
the ARIZONA MUTUAL SAV-  
INGS AND LOAN ASSOCIA-  
TION and ARIZONA TRUST  
COMPANY, and the Intervening  
Petitioners Who were Allowed to  
Intervene in the cause Entitled  
CHARLES W. CLARK, Com-  
plainant, vs. ARIZONA MU-  
TUAL SAVINGS AND LOAN  
ASSOCIATION and ARIZONA  
TRUST COMPANY, Defendants,  
in the Court Below, by the De-  
cree of March 12, 1914,  
Appellees.

MOTION AND PETITION FOR REHEARING  
OR TO CERTIFY QUESTION TO U. S.  
SUPREME COURT OR FOR STAY  
OF MANDATE

PAUL RENAU INGLES,  
Solicitor for Appellant,  
Fleming Block,  
Phoenix, Arizona.



UNITED STATES CIRCUIT COURT OF AP-  
PEALS FOR THE NINTH CIRCUIT

---

FARMERS AND MERCHANTS'  
BANK, PHOENIX, as Intervener,  
Appellant.

vs.

ARIZONA MUTUAL SAVINGS  
AND LOAN ASSOCIATION and  
ARIZONA TRUST COMPANY  
and SIMS ELY, as Receiver for  
the ARIZONA MUTUAL SAV-  
INGS AND LOAN ASSOCIA-  
TION and ARIZONA TRUST  
COMPANY, and the Intervening  
Petitioners Who were Allowed to  
Intervene in the cause Entitled  
CHARLES W. CLARK, Com-  
plainant, vs. ARIZONA MU-  
TUAL SAVINGS AND LOAN  
ASSOCIATION and ARIZONA  
TRUST COMPANY. Defendants,  
in the Court Below, by the De-  
cree of March 12, 1914,  
Appellees.

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No. 2425

MOTION  
AND PE-  
TITION  
FOR RE-  
HEARING.

And now within the time prescribed by law  
comes the appellant above named and moves this  
Honorable Court to grant a rehearing in this  
cause and to grant the other relief specified in the



petition hereto annexed upon the grounds therein set forth and for such other relief in the premises as may be proper.

Dated February 23, 1915.

PAUL RENAU INGLES,  
Solicitor for Appellant,  
Fleming Building,  
Phoenix, Arizona.

UNITED STATES CIRCUIT COURT OF AP-  
PEALS FOR THE NINTH CIRCUIT

---

FARMERS AND MERCHANTS'  
BANK, PHOENIX, as Intervener,  
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vs.

ARIZONA MUTUAL SAVINGS  
AND LOAN ASSOCIATION and  
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COMPANY, and the Intervening  
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ASSOCIATION and ARIZONA  
TRUST COMPANY. Defendants,  
in the Court Below, by the De-  
cree of March 12, 1914,  
Appellees.

No. 2425

PETITION  
FOR  
REHEARING

---

TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE NINTH CIRCUIT  
AND TO THE HONORABLE JUDGES  
THEREOF:

The petition of the Farmers and Merchants'  
Bank, Phoenix, appellant above named, respect-  
fully shows to this Honorable Court and alleges:

1. Heretofore and on February 1, 1915, this learned Court rendered a judgment of affirmance in the above entitled cause affirming as to this appellant a certain alleged decree and order entered in the District Court of the United States for the District of Arizona on March 12, 1914, in a cause entitled in that court Charles W. Clark, Complainant, against the Arizona Mutual Savings & Loan Association and the Arizona Trust Company, Defendants.

II. And your petitioner respectfully alleged that this learned Court erred in deciding said appeal and in affirming the decree and order of March 12, 1914, in the court below in each and all of the following respects:

1. In deciding that "The decree of February 27, 1913 denies the rights of a large number of stockholders who are not named therein and unjustly distributes the money of the insolvent Loan Association contrary to the pleadings and the purposes of the suit."

And in deciding that the decree arbitrarily decrees repayment to certain named stockholders of the Loan Association and excludes from the benefits of the decree a large number of stockholders who had not appeared therein and to whom no notice was given.

And also in deciding in effect that the decree of February 27, 1913, is void for error of law appearing on the face thereof or for any cause.

Your petitioner respectfully alleges that the decision here complained of results from a miscon-

ception of the situation as it actually existed below when the decree of February 27, 1913 was rendered and from the impression that an injustice was then done to the intervenors named in the petition of July 15, 1913.

But no injustice was done to such or to any other persons. These last named intervenors were admittedly Trust Company stockholders and were not then Loan Association stockholders. As appears from their own intervening petition, their sole claim to the right to rescind their exchange of stock or stock subscription in the Trust Company and to be restored to their status as Loan Association stockholders depends entirely upon proof that some time in 1911 they were induced by fraudulent representation to exchange their stock in the Loan Association for stock in the Trust Company.

The record in cause 2417 shows that many of these intervenors were admitted as parties to the record in the cause but they voluntarily withdrew therefrom preferring to condone the fraud which they said had been perpetrated upon them and to cast their lot with the Trust Company and they continued in this condition until after your petitioner recovered its judgment against the Trust Company when they and a large number of other Trust Company stockholders sought to rescind their exchange or stock subscription to the end that they might thereafter appear as Loan Association stockholders instead of as Trust Company stockholders. The persons named in the decree of February 27, 1913, were all Loan Association stockholders, including those who had promptly urged and ob-



tained the right to rescind. There were approximately 59 Loan Association stockholders whose claims aggregated approximately \$20,000 in amount who were named in and derived the benefits of the decree, although no one represented them below and all that any of these stockholders received was a lien on the assets of both companies for the amount each had paid into the companies without interest.

They voluntarily surrendered all attempts to recover on their contract, namely about \$1000, for every \$600, paid in and recognized the complete abrogation of their contracts with the insolvent Loan Association. If any of those named in the decree of February 27, 1913, were borrowers the receiver had ample power to collect the debt before he paid them in accordance with the terms of the decree, so that no improper advantage was obtained over anybody else because of the supposed existence of such loans.

Equality in the distribution of an insolvent's estate is the fundamental basis of equity and justice.

As Circuit Judge Sanborn said in *Nichols vs. Waukesha Canning Co.*, 195 Fed. 807, 815:

“As a general rule this maxim (equality is equity) governs all insolvent estates. All creditors are to be regarded as having equal claims unless some can show either a legal priority or a better equity.”

The effort of the decree of February 27, 1913, was to bring about perfect equality among all the

Loan Association stockholders and this was actually accomplished.

It would indeed have been an extraordinary distribution of the Loan Association's assets at that time to have awarded persons who were no longer stockholders of the Loan Association a share therein.

After the decree of February 27, 1913, was rendered and when notwithstanding its leniency to the Trust Company and its stockholders, the Trust Company was again confronted with failure and complete inability to discharge its obligations to supervening creditors, it was then too late for the Trust Company stockholders to repent of their unfortunate choice and determination and seek to deprive your petitioner of its rights by seeking to share equally with those named in the decree of February 27, 1913.

They were no long entitled to share equally with the diligent.

The diligence of those named in the decree of February 27, 1913, created a superior equity in their favor as against those who subsequently were permitted to intervene.

Equity aids the vigilant, not those who slumber on their rights.

Assuming that these latter persons had any rights whatever superior or equal to those of your petitioner, which is respectfully denied, nevertheless the matters decided by this learned Court as aforesaid were erroneous.

As to your petitioner, the decree of February 27, 1913, was immune from collateral attack and is now immune from review and correction here.

Your petitioner was not a party to the decree but by virtue of its judgment acquired a vested property right in the surplus created by it.

So far as your petitioner is concerned, it is wholly immaterial whether or not the Court that granted it committed error in its rendition in any of the respects asserted. Such errors as were committed, if any, were never corrected by a court having jurisdiction to revise the decree for error and your petitioner's rights therein became vested and were not subject to be divested by any act of the parties or the court that rendered the decree or long after the time to appeal therefrom had expired by this learned court upon an appeal from an entirely different decree and order.

But on the merits of the foregoing assertions your petitioner respectfully alleges that the decree of February 27, 1913, is not void for any cause and does not deny the rights of a large or any number of stockholders who are not named therein, but on the contrary as conclusively disclosed by the face of the decree and record (Record 7, 8, 43) every stockholder of the Loan Association was specified therein and the rights of each recognized and protected as such. Nor did such decree unjustly distribute the money of the insolvent Loan Association contrary to the pleadings and the purpose of the suit, for it appears from the record that each stockholder was awarded a lien upon the properties of both companies to secure the repayment to

each stockholder of the amount each had paid in to such companies. This manner of distribution resulted in perfect equality among all of the Loan Association stockholders and was consequently a just method of distribution and no Loan Association stockholders complain of it or assert that they as Loan Association stockholders were omitted from the terms or benefits of the decree of February 27, 1913.

The decree of February 27, 1913, did not assume to adjudicate the rights of any of those who had been stockholders of the Loan Association, but who at the time the decree was rendered had ceased to be Loan Association stockholders and had become and then were stockholders in the Trust Company, because the suit was brought for the benefit of Loan Association stockholders and to distribute its assets to its stockholders and not for the benefit of Trust Company stockholders or to distribute the assets of the Trust Company, in consequence of which your petitioner respectfully alleges that stockholders of the Trust Company who had not secured judicial authority to rescind their exchange of stock in the Loan Association for stock in the Trust Company were not similarly situated or in the same class with stockholders of the Loan Association who had never exchanged their stock in the Loan Association for stock in the Trust Company or otherwise impaired their status as Loan Association stockholders. Nor were such stockholders in the same class with those who had exchanged their stock and who had secured after a trial judicial authority to rescind the exchange in question and your petitioner respectfully alleges that stockholders of the Trust Company were obvi-



ously not proper parties to the suit and were not entitled to individual notice of the proceedings in the court below, although each such stockholder in reality had such notice by and through their corporation, the Trust Company, because Trust Company stockholders were not in the same situation as Loan Association stockholders for whose benefit exclusively the proceeding in the court below was instituted. None of the Trust Company stockholders were entitled to rely and in fact did not rely upon the complainant below or any of the intervenors therein prior to the rendition of the decree, to obtain for such Trust Company stockholders any relief whatever, but said Trust Company stockholders relied exclusively upon the benefits which the decree of Feb. 27, 1913, conferred upon them by and through their corporation, the Trust Company, and as such accepted the benefits of that decree long after the decree was granted and long after the expiration of the term at which it was entered and it was not until three days after the recovery by your petitioner of a judgment of \$18,500.00 against the defendant Trust Company that its stockholders sought to repudiate their status as Trust Company stockholders and by so doing to avoid the consequences of their acts and obtain priority in the distribution of their insolvent corporation's assets over and above your petitioner as its lawful judgment creditor.

Nor was the relief awarded by the decree of February 27, 1913, contrary to or not within the pleadings or the purpose of the suit, since it is not inconsistent to award a complainant a lien on property where he specifically prays restitution of the whole:

Jones vs. Missouri Edison Electric Co., 144 Federal, 765-768.

Erie Railroad vs. Dial, 140 Federal, 689, 691.

Smith vs. Township, 150 Federal, 257, 261,

for it is apparent that a court which admittedly has jurisdiction to grant the whole of the relief prayed must have jurisdiction to grant a portion of the relief to which the parties were entitled.

And even if this were not so, the particular relief awarded was properly grantable under the prayer for general relief, especially where, as shown by the record in cause No. 2417, the defendants were present at the trial actively participating therein, contesting the cause and actually inducing the trial court to award the particular relief which it finally granted.

These latter circumstances were entirely absent in the case of Reynolds vs. Stockton, 140 U. S., 254, relied upon by this learned Court to support its judgment of affirmance.

In support of the foregoing proposition, we respectfully direct attention to the following:

Lockhart vs. Leeds, 195 U. S., 427.

Walden vs. Bodley, 14 Pet., 156, 164.

Backus vs. Brooks, 195 Federal, 452, 454.

Underground Electric Railroad Co. vs. Owsley.  
169 Federal, 671-675.

Taylor vs. Earl, 8 Hun., 1-3.

But your petitioner respectfully alleges that even if, as asserted, the decree of February 27, 1913, has denied the rights of a large number of stockholders either of the Loan Association or of the Trust Company and has unjustly distributed the Loan Association money contrary to the pleadings and the purpose of the suit, yet nevertheless mere error and not total invalidity resulted and the decree of February 27, 1913, is nevertheless valid and binding as to your petitioner and other third parties after the expiration of the term at which it was entered and is immune from collateral attack at the instance of persons not parties to the record in the court below at the time of the rendition of the decree of February 27, 1913, and your petitioner respectfully alleges that even in the event supposed the court below was wholly without jurisdiction to vacate the decree of February 27, 1913, after the expiration of the term at which it was granted.

Re Dennett, 215 Federal 673.

Re Metropolitan Trust Co., 218 U. S. 321.

U. S. vs. Mayer, 35 S. C. R. 16.

Hine vs. Morse, 218 U. S. 493, 505.

In Re Dennett, 215 Federal 673, 674, this learned Court said: "We are impressed that where a court has attempted subsequent to the term at which a judgment or decree is rendered, to set aside or annul such judgment or decree, it presents a case where the court has acted wholly without jurisdiction or power in the premises and its act in that respect is void and that mandamus will lie to correct the error."

We respectfully submit that the present affirmance of the decree of March 12, 1914, is in irreconcilable conflict with the opinion of this learned Court above quoted. It is true that in expressing the opinion quoted this learned Court expressly reserved final judgment thereon until a hearing upon the return of the alternative writ of mandamus granted in cause 2417, but we respectfully remind the Court that it is now asserted that the invalidity of the decree of February 27, 1913, results because "such errors of law appear upon the face of the decree (of February 27, 1913) as to render it void."

We respectfully submit that such errors of law as are now said to appear upon the face of the decree of February 27, 1913, and which it is said render it void, were equally apparent when this learned court rendered its opinion in cause 2417 above cited. The record has not changed and we respectfully submit then and now conclusively demonstrates the total absence of power in the court below to render the decree of March 12, 1914, from which it necessarily follows that the affirmance here complained of was and is erroneous.

2. But your petitioner alleges that further grave error was committed by this learned Court in that by its said decision and judgment this Court has in effect decided and determined that stockholders in an insolvent corporation may seek and exercise the remedy of rescission after the rights of a judgment creditor have intervened and attached to the subject matter and by so doing that such stockholders may obtain preference and priority in the distribution of the insolvent estate paramount and superior in equity to that of the judgment creditor



and in this connection your petitioner respectfully alleges that such decision is not only contrary to law;

American National Brokerage Co., 193 Federal 772; Meehan vs. Southern M. I. C., 72 Federal 957, 960; Meehan vs. Carlson, 107 Pacific 755, 760; Keyes vs. Medicine Co., 148 Northwestern 505, 506.

but is in this respect in direct conflict with two decisions of the United States Circuit Court of Appeals for the Eighth Circuit, namely;

Scott vs. Abbott, 160 Federal 573, 580-582;  
Marks vs. Merrill Paper Co., 203 Federal 16-19.

That this is the inevitable effect of permitting Trust Company stockholders to rescind their stock subscriptions after the rights of the creditor have supervened is obvious.

Rescission restores these Trust Company stockholders to their status as Loan Association stockholders and to the extent of the many thousands of dollars represented by their claims diminishes and in fact completely wipes out the fund and assets upon which your petitioner acquired and possessed an adjustable lien to the extent of \$18,500.

3. And your petitioner respectfully alleges that further error was committed by this learned

Court in deciding that "The decree of March 12, 1914, rectifies the errors of the former decree and provides for a just distribution of the assets of the corporation," in that the decree of March 12 does not even contain a direction to the Master to take proof of claims against the Trust Company and indeed could not lawfully so direct since with your petitioner's bill dismissed there is no proceeding pending in the court below which in any way relates to the defendant Trust Company and the winding up of its affairs.

We respectfully submit that the decree of March 12, 1914, in reality is unjust and inequitable in that in effect without a hearing and without the taking of any evidence whatsoever it destroys the vested property right of your petitioner in and to the surplus moneys resulting from the decree of February 27, 1913, and in reality produces great confusion, for the decree of March 12 does not specify to what extent the decree of February 27, 1913, is invalid and as already indicated, in effect sanctions and authorizes the stockholders in the defendant Trust Company in March, 1914, long after the recovery of your petitioner's judgment to exercise the remedy of rescission for a fraud alleged to have been perpetrated upon each such stockholder separately, sometime in the year 1911 and thereby awards to such stockholder priority in the distribution of the insolvent assets over your petitioner and moreover utterly destroys the stability and finality of the decrees and judicial proceedings of the Federal Court in the District of Arizona, while the order of March 12, 1914, finally dismisses your petitioner from the court below, a court which admittedly had exclusive jurisdiction to grant your

petitioner any relief in the premises, denied your petitioner the right of process in order that the defendants might not be required to respond to its demands which was a simple but effective denial of the right of your petitioner to have a hearing, denied your petitioner's application to extend the receivership of the Trust Company to its lawful judgment and denied your petitioner's prayer to marshal the assets of the Trust Company, deprives your petitioner of its right to enforce its judgment against the Trust Company stockholders whose stock subscriptions remained unpaid as alleged and takes and appropriates all of the assets of the Trust Company (including assets acquired after its transactions with the Loan Association upon which your petitioner had acquired an equitable lien and dedicates these assets to the interests of mere stockholders in the Trust Company, many of whom were never even stockholders of the Loan Association at any time, thus leaving your petitioner wholly remediless in the premises completely stripped of its rights.

4. And your petitioner respectfully alleges that further error was committed in deciding that " \* \* \* even if the errors of law are not such that they might thus have been corrected, the case is clearly one in which those results could have been obtained by a bill of review for that purpose and the petition filed July 15, 1913, which was filed within the time allowed for taking an appeal from the prior decree, may properly be regarded as a bill of review."

And the error predicated thereon is this: that the errors complained of in the petition of July 15,

1913, were not errors of law arising on the face of the record nor were the intervenors named in the intervening petition of July 15, 1913, competent to file a bill of review because they were not parties to the original record when the decree of February 27, 1913, was entered and moreover the petition of July 15, 1913, wholly fails to negative the gross laches of which those petitioners were obviously guilty notwithstanding their mere denial thereof.

No proper case is shown for the exercise of such extraordinary leniency towards the intervenors. The Supreme Court of the United States in *Hopkins vs. Hebard*, 35 S. C. R. 25, 27, recently said of a bill of review for newly discovered evidence: "The functions of a bill of review filed for newly discovered evidence is to relieve a **meritorious complainant** from a clear miscarriage of justice where the court is able to see upon a review of all the circumstances that the remedy can be applied **without mischief to the rights of innocent parties and without unduly jeopardizing the stability of judicial decrees**. The remedy is not a matter of absolute right but of sound discretion," citing cases.

Thus, all the essential elements to justify the exercise of such discretion in this instance appear to be missing.

But as an additional reason why the petitioners named in the petition of July 15, 1913, are not entitled to intervene and secure the vacation of the decree of February 27, 1913, your petitioner respectfully directs attention to a certified copy of the affidavit of one C. L. Nabers verified July 29, 1913, and duly filed in the court below, a certified copy



of which is hereto annexed and made a part hereof, a copy of which your petitioner is informed and verily believes was in the early part of August, 1913, duly served upon the receiver, and which so far as your petitioner is aware has never in any respect been denied or controverted, from which affidavit it appears, not only that all of the petitioners named in the petition of July 15, 1913, are in equity and good conscience estopped to assert the rights therein claimed by them, but that many of the persons named in the petition of July 15, 1913, never had any connection whatsoever with the Loan Association but were and always had been ordinary stockholders of the Trust Company.

And further because it appears of record herein (R. 25) that on the 14th of April, 1913, Circuit Judge Morrow sustained a demurrer to the petition filed in the court below April 5, 1913, by most of the same petitioners named in the petition of July 15, 1913, which petitions were in legal effect identical one with the other and in this connection your petitioner respectfully alleges that by whatever name the petition of July 15, 1913, may now be designated, the learned Circuit Judge to whom we have referred in effect expressly decided on April 14, 1913, that the persons therein named were not entitled to the relief prayed for or to any relief in the premises whatsoever. And for this decision of Circuit Judge Morrow, your petitioner claims a conclusive and binding effect upon the said District Court as constituted in March, 1914, as the law of the case since that decision was never reversed by appropriate appellate procedure.

Gayler vs. Decatur Mineral & Land Co., 112 Federal 449.

Wapeen vs. Davis, 44 Federal 532, 533.

Cornwall vs. Davis, 44 Federal 533.

Hadden vs. Natshang Silk Co., 84 Federal 80.

Raphael vs. Frank, 118 Federal 678.

Meeker vs. Lehigh Valley Railway Co., 175 Federal 320.

Montgomery vs. McDermott, 99 Federal 502.

Cleveland vs. Cleveland, etc., R. Co., 93 Federal 113.

Central Trust Co., vs. Wabash Railroad Co., 144 Federal 476.

Thus it appears that notwithstanding the finality of the decree of February 27, 1913, and of the total absence of power in the District Court in the District of Arizona as constituted in March, 1914, to revise and correct that decree for mere error, that the learned District Court as constituted on March 12, 1914, disregarding the finality and conclusive effect of the decision of Circuit Judge Morrow in sustaining the demurrer on April 14, 1913, reversed Judge Morrow and revised his decision and now this learned court affirms the District Court in such reversal.

5. And further error is predicated upon this learned court's assertion, "In that decree (referring to the decree of March 12, 1914) the rights of the appellant are fully protected and provision is made for presentation of its claim to the Master in Chan-

cery to be paid out of the available funds which may remain in the 'Trust Company' because it is inadvertently supposed that the decree of March 12, 1914, contains such provision, which a careful inspection thereof shows is not the case.

6. And further error is alleged to have been committed in affirming the denial of the petitioner's right to intervene below and in holding this right to be within the properly exercised discretion of the court below, since as your petitioner respectfully alleges the right in this type of case, is absolute and not dependent upon the discretion of the court below and if so dependent that discretion was improperly exercised in denying intervention to your petitioner as a judgment creditor and in granting it to mere stockholders:

Credits Commutation Co. vs. United States, 91 Fed. 573; 177 U. S. 315, 316.

Myers vs. Fenn, 5 Wall. 207.

Richmond vs. Irons, 121 U. S. 43, 47.

National Bank vs. Allan, 90 Federal 545, 555.

Hubb vs. Bidwell, 151 Federal 564.

And since your petitioner respectfully alleges that the decision of this learned court is not only erroneous in the matters specified which require a rehearing thereof and a reversal of the decree and order complained of but at least in two respects presents errors of so grave a character involving considerations of such public importance as to cause it to be the duty of the Supreme Court of the United States to review and revise the proceedings

by certiorari if not corrected here, your petitioner humbly prays that in the event that its application for rehearing is denied this learned Court will either certify to the Supreme Court of the United States the question hereinafter propounded or in the alternative that it grant a stay of its mandate herein for a reasonable time hereafter in order that your petitioner may have a reasonable opportunity in which to apply to the Supreme Court of the United States for the certiorari above referred to.

And as evidence of your petitioner's good faith in this request and to show that the matters herein are of such character as to justify this court in certifying the question herein involved to the Supreme Court of the United States for determination, your petitioner respectfully directs attention to the case of the United States vs Mayer, 35 S. C. R. 16, where the United States Circuit Court of Appeals for the second circuit deemed a similar question of sufficient consequence to justify its certification to the Supreme Court for determination.

And in support of your petitioner's respectful contention that this case is one in which certiorari should be granted by the Supreme Court of the United States in the event that the errors here complained of are not corrected in this learned Court, your petitioner respectfully asserts that by affirming the decree of March 12, 1914, this learned Court has sanctioned a district court of the United States while acting wholly without jurisdiction in vacating a valid final decree in equity after the expiration of the term at which it was granted, which we respectfully submit constitutes a matter of such gravity that it will be corrected by the Supreme Court of



the United States by the issue of extraordinary writs out of that court when necessary so to do.

William Cramp Sons vs. Curtis Turbine Co.,  
228 U. S. 645, 650.

Re Metropolitan Trust Co., 218 U. S. 321.

And further, because, as already indicated, this learned Court's decision is in conflict in the respect heretofore stated with those of the United States Circuit Court of Appeals for the Eighth Circuit in the cases cited and it is desirable in the public interests that such conflicts should be settled by the Supreme Court of the United States and should not exist.

Wherefore, your petitioner respectfully prays for the vacation of the judgment of affirmance and that a rehearing be granted and that thereupon the decree of March 12, 1914, and the order of the same date be reversed or in the event that rehearing is denied that this learned Court certify to the Supreme Court of the United States the question of whether or not the United States District Court for the District of Arizona had jurisdiction on March 12, 1914, after the expiration of the term at which the decree of February 27, 1913, was rendered to vacate that decree as against the rights of your petitioner herein as a judgment creditor of the defendant Trust Company in and to the surplus created by the decree of February 27, 1913, upon motion of persons not parties of record to the cause when the decree of February 27, 1913, was entered or in the alternative to stay the issuance of the mandate herein for a reasonable time after the decision of

this motion to enable your petitioner to apply to the Supreme Court of the United States for a certiorari to bring up to that court the record herein for review and correction.

And your petitioner as in duty bound will ever pray.

FARMERS AND MERCHANTS' BANK, Phoenix.

PAUL RENAU INGLES,

Solicitor for Petitioner, Fleming Building, Phoenix,  
Arizona.

#### CERTIFICATE OF COUNSEL

As counsel for the petitioner herein, I respectfully certify, that in my judgment the grounds and reasons urged in the foregoing petition for a rehearing of the above entitled cause and for the other relief therein prayed for are well founded and I further certify that this petition for rehearing is not interposed for delay.

PAUL RENAU INGLES,

Solicitor for Petitioner.

Dated February 23, 1915.

**PART II.**

IN THE DISTRICT COURT OF THE UNITED  
STATES, DISTRICT OF ARIZONA

CHARLES W. CLARK,

Complainant,

vs.

ARIZONA MUTUAL SAVINGS &  
LOAN ASSOCIATION, AND  
ARIZONA TRUST COMPANY,

Defendants.

DISTRICT OF ARIZONA,	}	ss.
STATE OF ARIZONA,		
COUNTY OF MARICOPA,		

C. L. NABERS, being duly sworn, deposes and says: I am an auditor by profession and as such have been in the past engaged both by George D. Christy as Temporary Receiver of the defendant Arizona Mutual Savings and Loan Association, and Sims Ely, Esquire, as temporary and permanent receiver of both the defendants above named, and that in the course of my work for both the said receivers, I acquired and have a familiarity with the books, accounts and affairs of each of the defendants above named, and am familiar with all the matters hereinafter set forth.

I have carefully examined the books and records of both the defendant companies for the purpose of identifying each and all of the petitioners named in the petition and intervention filed herein on or about July 15, 1913, with the persons therein named by Benton Dick, Esquire, Robert E. Morrison, Esquire, and Joseph E. Morrison, Esquire; for the purposes of convenience I have divided each and all of the persons so named under the following classes.

The following persons are hereinafter referred to as those in Class One, and each and all of said persons were formerly stockholders in the defendant Loan Association, but who subsequently transferred their stock in the Loan Association for stock in the defendant Trust Company, and for the first time have appeared in this litigation in and by the said petition of July 15, 1913:

#### CLASS ONE

Mrs. L. B. Allison	L. F. Kuhn
P. W. Black	F. W. Massie
J. K. Corbett	Cherora Polk
D. W. Ellsworth	(Clara Polk)
J. M. Gibbs	F. E. Potts
Wm. Ham	D. Romeo
H. O. Jasted	J. Willis
M. A. Kreling	Herman Binkerhoff
W. H. Merratt	T. R. Blonblerg
S. Sarah Oliver	A. Chisholm
M. Pascale	Daniel F. Groggans
E. B. Robles	M. A. Roberts
R. C. Smith	(Nellie I. Roberts)
Versa Willis	D. Keith



Mrs. I. W. Bartholemu	J. S. Merratt
Pierce Bailey	A. P. Martin
B. Carrette	Lizzie Polk
Y. M. Gallogos	Rena Ridley
F. L. Hugert (Hubbell)	V. A. Rosenfeld
E. B. Jennings	F. T. Willis
E. A. Jacobs	

Each and all of the following persons are hereinafter designated as members of Class Two, and each of said persons were original stockholders in the defendant Loan Association, but exchanged their stock therein for stock in the defendant Trust Company, and thereafter petitioned this Court by petition filed herein on April 5, 1913, by and through their attorney, Benton Dick, Esquire, for leave to intervene herein and for the other purposes specified in the other petition, except

Elmer G. Carroll	B. Hock
J. T. Griffiths	Frances X. Conrad

each of whom were before the Court in the first intervening petition filed herein July 15, 1912, by their attorney, William M. Seabury, and who were on or about August 6, 1912, dismissed from said litigation.

## CLASS TWO.

J. L. Waring	Edgar O. Brown
Mrs. C. F. Richardson	John T. Steinmetz
G. E. Phelps	Innocente Morralles
R. N. Stapley	John F. Klock
Frank W. Snakel	H. G. Hong Fong
David B. Lovell	John Wagner

August P. Neu	Frank Pister
August Johnson	Daniel Hubbard
Irving Devery	J. H. Barnett
Mrs. Stella Wade	R. W. Wagner
Chas. Chan	Fred Housing
Mrs. Maud Webster	G. I. Smith
C. T. Wise	Martin F. Taylor
Mrs. Lulu W. Carruthers	August Schwalbe
Lessuer & Co.	Oscar Emerson
C. H. Chulz	F. (K.) Smith
Thomas A. Rickel	A. E. Gilliard
Mrs. Margaret Babbitt	

Each and all of the following persons are herein designated as members of Class three:

### CLASS THREE

Charlotte Monroe	John Wagner
L. U. Frederico	

and each of these persons are already named in the final decree of February 27, 1913. and are awarded the respective sums due to each.

Each and all of the following persons are herein designated as members of Class Four, and each and all of the persons in Class Four are and always have been stockholders in the defendant Trust Company exclusively and never at any time had anything whatever to do with the defendant Arizona Mutual Savings & Loan Association. This Class includes the following:

### CLASS FOUR

R. W. Bishoff	J. L. Hubbell
C. L. Day	D. C. Palmer

Nelson Gorman	H. B. Wilcox
Minnie C. Blesi	G. I. Smith
Miss E. C. De Vine	J. G. Sturgeon
E. B. Lincoln	Joseph Morello
A. H. Curley	A. C. Sandoval
J. J. De Vine	C. T. Wise
Imocente Morales	J. W. McLaughlin.
S. E. March	

Each and all of the following named persons are those of whom no trace of any kind or character can be found upon the books of either of the defendants. This class includes:

#### CLASS FIVE

Lessner & Co.	C. N. Cotton
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These persons are probably assignees of some assignor who was connected with one or both of the defendants.

It appears from the records on file with the Receiver that all of the persons named in Class One, and many of the persons included in the other Classes hereinbefore described as well, had notice as early as March, 1911, of the transfer then proposed to be made of all of the assets of the Loan Association to the Trust Company.

Many of the original proxies signed by persons in Class One are of record with the said Receiver, and pursuant to such proxies, authority was confirmed upon Leroy H. Civile, who voted at the stockholders' meeting of the defendant Loan Association held April 11, 1911, and on the adjourned

dates thereof, and that the following is a copy of the authority so conferred on said Civile by W. K. Christie in whose favor all of the original proxies on file with the said Receiver originally ran:

I hereby substitute and appoint Leroy H. Civile to vote all shares of stock of the Arizona Mutual Savings and Loan Association, a corporation, organized under the laws of Arizona, standing in my name upon the books of said corporation, and all shares of stock for which I hold proxies to vote the same, and specially hereby appoint the said Leroy H. Civile to vote at all stockholders' meetings of said corporation all of the shares of stock held and standing upon the books of said corporation in the names of the following persons, to-wit:

H. D. Underwood; Lloyd B. Christy; W. K. Christie; J. W. Edwards; F. R. Ingle; Vivian E. Moreno; Parks & Parks; Peter T. Robertson; P. O. Spittler; John Wadin; S. Y. Barkley; T. R. Blomberg; E. T. Collins; H. Capin; A. J. Dimezo; B. Duncan; R. R. Gross; E. A. Jacobs; Ed. G. Robles; Ernestina Robles; Charles F. Weber; Caroline M. Weber; W. E. Young; R. R. Brena; R. C. Brena; M. C. Durick; Maria Anna R. de Encinas; H. B. Glover; Geo. S. Hughes; Angela Marquez; Andrew P. Martin; Sarah E. Oliver; Debetrio T. Romere; Mrs. C. F. Richardson; S. M. Walker; Rosario G. Lopez; Esperanza Coeuer; J. Knox Corlett; S. H. Drachman; Emilia Elias; Clara Ferrin; Martha Kreiling; Rosilia McKay; Francisca Munguier; F. A. Pease; John Stiegler; Minnie Woddell; Yosidow Angan; Lotta B. Allison; Note Allison; P. W. Black; Jas. K. Brown, Jr.; Irving DeVry; Lunor C. Feder-



ico; Est. Mrs. Freeman Fike; Louis Hughes; Mrs. F. Pascal; Mrs. Rena Ridley; W. B. Simpson; H. A. Dalton; Mrs. A. J. Collins; A. J. Collins; H. P. Doherty; Mrs. T. C. Divz; Chester R. Freeman; Cynthia Gray; A. J. Haldin; Leogoldine Kimpf; Horace P. Merrill; Horace P. Merrill; J. S. Merrill & Son; Henry Walker; Thos. R. Wright; W. E. Wright; J. W. Angle; Lyman H. Hays; S. N. Kemp; H. A. Morgan; J. V. McCourt; H. L. McCoy; Harry O. Parks; J. B. Cook; Samuel Arneson; Meta Arndt; B. Caretto; G. Debily; Mrs. A. L. Duncan; James D. Harney; H. Hatfield; Frank Itzureiri; J. Jackson; Mark P. John; Mrs. A. Kindred; E. Marks; Miss E. A. Rogsdale; John M. Reardon; C. T. Scott Estate; Hannah S. Studley; I. W. Wallace; J. E. Warlop; J. & F. Wahlschlegal; S. K. Williams; F. M. Ruff; J. V. Shurr; J. A. Taylor; Alex. Anderson; D. Bohu; Josephine Barks; Margaret Cadwell; Fred E. Cadwell; Joe Conley; F. S. Douglas; Salbacher B. de Lucas; Jas. H. East; Mrs. M. L. Graves; W. H. Hanwood; Theo and Ole Holbane; Mrs. W. S. Hunt; Albert T. Kleinschmidt; M. Kirschwing; J. E. Lindley; Alfred C. Lockwood; L. D. McCartney; H. R. Bash; A. J. Shropshire; Ursulla M. Shultz; J. S. Scott; Edgar Thompson; P. B. Wood; R. N. French; A. M. Dyer; Frank E. Murphy; Pat Smith; R. B. Sims; C. M. Brown; Adolph Bahm; A. W. & A. M. Cassou; E. Equist; D. R. McPherson; John M. Cartau; Olaf Olson; Hugo Sonoquist; E. F. Staebler; Eugene Seeleg; B. C. Smith; Maria B. Stevnes; J. H. Beak; H. Bingham; Domenico Gerasa; L. H. Payne; S. F. Lanford; Eugene W. Swacher; Fred Vallero; Mrs. J. R. Martyr, Jr.; J. R. Martyr, Jr.; J. M. Welsh; Mrs. Wheaton Berault; Thos. J. Carroll; Mrs. Gladys Cotey; Lamar Cobb; Mrs. F.

D. Connor; Louis R. Crawford; Cora E. Dunnagan; Mrs. Wm. Halley; J. W. Horton; La Vern Johnson; Mrs. Jas. W. Gookby; Curry H. Love; Curry H. Love; H. C. Mix; Mrs. W. C. Marshall; Mrs. August D. Miller; Mrs. August D. Miller; William Morris; C. A. Nichols; John M. Pollerk; Mrs. Mary Proctor; Robert Russell; K. M. Schade; E. G. Schade; Richard Stephen; Mrs. S. A. Spann; John Stirrat; John Stirrat; Mrs. L. C. Tuttle; Walter Tappin; Victor Willits; Estelle Widener; E. U. Williams; Walter Wallace; E. C. Mason; Joseph Carpenter; R. W. Chserbertram; Robert G. Phillips; Jas. Alder; Ed. Barry; E. W. Clayton; E. W. Clayton; E. W. Clayton; Wm. C. Faulkner; Wm. C. Faulkner; Wm. C. Faulkner; E. W. Jones; C. W. Morris; Lucy H. Purdum; W. E. Platt; W. E. Platt; Dr. John Newton Stratton; Lee N. Stratton; John F. Weber; A. H. Ferrin; Allen Rose; Fannie R. Page; A. L. De Mund; Mrs. Mary Black; W. W. Brookner; R. H. Daniel; Ada De Jaey; Elmer Decker; John L. Davis; Ida N. Frye; Globe Lumber Co.; Mrs. J. L. Gibson; Lewis C. Gibson; Alfred Hansen; Mrs. Fannie Hearn Keene; Em. Heger; Mrs. Emma C. Joyce; Jos. J. Murphy; Fred W. Moore; R. W. Mayre; A. E. Morcom; O. W. Miller; George Parr; Chas. Quinn; A. D. Rosecrans; William Sobey; S. J. Sims; Martha C. Smith; W. H. Butler & F. L. Toombs; Wm. Whalley; H. P. Wightman; Kittie L. Young; William P. Rose; W. B. Rickman; H. N. Rascoe; Harry Sultan; W. H. Watts; Ed. Kilander; F. G. Pruett; J. E. Pruett; N. Beckerman; J. B. Newman; Barney Johnson; Clifford D. Fies; John H. Fitzpatrick; J. C. Givens; J. V. Hoopes; F. E. Kieren; F. E. Miller; F. E. Miller; John Roddan; J. F. Russell; Ardell M. Russell; Joseph M. Schwartz; Eugene B. Tinker; J. M. Ward; T. M.

Ward; James R. Welsh; Ira Walker; D. F. Goggans; Roy Pemberton; G. A. Patterson; Ballard Day; S. H. Goodspeed; Fred Horn; Carlos Chreton; Murial Engassen; Mrs. W. J. Jackson; Harmon Lewis; August Doctors; G. W. Miller; Clara Sotelo; Pour Wing; W. White; Anita Barnder; Barrida & Narila; H. L. Johnston; Ellis Ruiz; Ramon Sesmo; Antonio Sesma; Oscar Sesma; Rosario Sesma; L. F. Arnadrel; J. B. McNeil; J. W. McLean; Grace L. Peters; R. B. Arbalto; Aquiles Arriola; J. G. Bogard; C. Bremenkauf; E. J. Bressenkunt; E. B. Weome; John C. Harris; Rev. Henry Heitz; J. G. Keating; S. E. Kent; M. B. Morrison; W. Y. Pucos; Frederic G. White; Thos. F. Weedon; F. E. White; Mrs. L. Y. Caruthers; Mrs. M. Hawkins; Leon Hawkins; Edgar Hunsaker; Dan Hibbert; Jos. E. Boble; Robt. N. Stapley; H. Brinkeshoff; Wiley H. Jones; Joseph H. Woolsey; Chas. F. Watson; Ricardo Aros; Jose Siguireros; Chas. M. Clark; Jos. Faull; R. W. Wagoner; C. D. Reppy; A. L. Boehmer; W. R. Perry; Julio Pedregan; Edgar A. Brown; Geo. V. Lester; Charlotte Monroe; Mrs. Jennie C. Partch; John B. Hughes; Rosario Sesma; Antonio Sesma; A. Pans; Concepcion Acevedo; Geo. W. Henry; David Goodwin; Pearl L. Bailey; Alfred H. Oeltjen; D. C. Palmer; M. Elizabeth Trout; Chas. A. Ridgway; Franklyn C. Potts; F. Valdez; C. S. Harrington; Claude Marshall; M. E. Langley; W. A. Lannon; A. E. Gillard; A. Lopez; H. N. Bryan; Lloyd C. Henning; Celia A. McLean; E. A. Boyd; Chas. Cahn; Frank T. Versa & Joshua Willis; H. L. Johnston; L. P. Clanton; H. E. Kell; Cora Mae Kell; Cora J. Kell; D. P. Jones; A. C. Kell; Newton E. Kell; Amelia Sarah Kell; Alice U. Solomon; Mrs. C. S. Brown; Oscar Sesma; Ramon Sesma; Frank L. Burgett, Jr.;

Aug. Johnson; Fred W. Albright; Margurette Babbett; Balzer Hock; M. F. Taylor; J. W. Francis; August Schwalbe; Fred Hensing; Archie Chisholm; G. H. Peters; W. E. Enos; H. C. Hamlin; N. C. Kimball; Alive Myers; Robert E. Zinck; Joseph Carpenter; O. C. Emerson; Geo. K. Anderson; Walter Brown; J. W. Harris; Mrs. H. K. Street; Miss Maude Webster; S. W. McPherson; Chlora Polk; Mrs. Lizzie Polk; Miss Johanna Hanson; E. J. Doyle; Arlimew Millett; Stephen Contreras;

hereby ratifying all lawful actions that the said Leroy H. Civile may take by reason of this proxy and authority, at any and all stockholders' meetings of the said Arizona Mutual Savings and Loan Association, and especially at the meeting of said stockholders held on the 11th day of April, 1911, and at all adjournments of said meeting, and especially at the adjourned meeting held on the 20th day of May, 1911, and all subsequent adjourned meetings of said meeting.

Witness my hand this 20th day of May, 1911.

(Signed) W. K. CHRISTIE.

Witness:

(Signed) F. G. KELLEY.

I am informed and verily believe that in the latter part of July, 1912, Alfred Le Baron, who was formerly connected with the defendant Trust Company, wrote and caused to be sent to each and every stockholder whose name appeared upon the books of either or both of the defendants as then stockholders in either of said concerns, notifying each and all of said persons among other things



of the pendency of the above entitled litigation and informing each of said persons of the dishonest character of A. J. Edwards, a former officer, manager and director of the defendant Trust Company, the following letter:

Alf. C. Le Baron

Lock Box 431.

Phoenix, Arizona, July 10th, 1912.

To the Stockholders of the Arizona Trust Company.

Because of the fact that mainly through my personal efforts something over 85 per cent of the stock of the Arizona Mutual Savings & Loan Association has been exchanged for stock of the Arizona Trust Company, and my connection with both companies having terminated, I deem it the right due the former stockholders of the Arizona Mutual Savings & Loan Association that they be informed of my personal relations with both companies and the reasons which prompted the severance of my connection with them.

Under the original plan of merger, except for the gross mismanagement of the affairs of the Arizona Trust Company by A. J. Edwards and Leroy H. Civile, his secretary, an exchange of stock should not have resulted otherwise than in greatly benefiting all stockholders of the Trust Company, including those who became stockholders by an exchange of Arizona Mutual stock.

Believing for some months past that the Trust Company needed a reorganization which would compel the transaction of its business along profit-

able and honest lines, such as were contemplated at the time an exchange of stock was suggested, I caused to be made, in the month of May, at my own expense, an examination of the affairs of the Company by an expert accountant, insofar as I could obtain access to the books.

This examination was resisted by Mr. Edwards (as far as he was able to do so) who at the time, and from the organization of the Company, had entire charge of its business.

It is sufficient to say, without going into details at this time, that the report of the accountant who conducted this examination, disclosed such an absolute lack of efficiency and honesty in the conduct of its business, that I could not longer afford to be identified with it.

I am addressing this letter to you for the double purpose, first—of advising you that I am no longer connected with the Company, and am in no wise responsible for its unfortunate condition; and, second—that those who may have been influenced by any effort of mine to exchange stock of the Arizona Mutual Savings & Loan Association for stock of the Arizona Trust Company shall in the future be guided only by their own judgment in their future dealings with this Company.

While it is true that I have severed my connection with these companies, in which I have labored conscientiously for the benefit of my numerous friends and clients throughout the State, and to which I have given the best there is in me, yet I stand ready to serve every interest of every indi-

vidual who has reposed confidence in me and accepted my recommendations in making their investments.

I will gladly assist anyone who may wish to consult me as to the best course to pursue in the present difficulties and I pledge my earnest endeavor toward working out a satisfactory solution.

Yours very truly,

(Signed) ALF. LE BARON.

And further that on or about August 7, 1912, the said Le Baron caused to be mailed to each and every such stockholder in the defendant companies, a printed copy and reprint from a report published in the Arizona Gazette, a newspaper published in the City of Phoenix, on August 7, 1912, which contained a report of the proceedings had before the Honorable William W. Morrow, in the above entitled cause, on or about August 5, 1912, which said notice is, as follows:

## WILL APPOINT RECEIVER IN THIRTY DAYS

---

Unless Arizona Trust Repays Intervenors, Judge  
Morrow's Decision.

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San Francisco, Cal., Aug. 7.—Judge W. W. Morrow, of the United States district court, who is temporarily in charge of the federal court for the district of Arizona, yesterday heard the arguments of the attorneys in the Arizona Mutual Loan and

Savings receivership application filed before him some time since. The arguments were heard in chambers, W. M. Seabury of Phoenix appearing for some thirty-nine or more intervenors to a petition that was originally filed by C. W. Clark, asking for a receiver for the Arizona Mutual and an injunction against the Arizona Trust Company, enjoining that company, which holds the assets of the Arizona Mutual, from in any way disturbing the present status of the assets of the Arizona Mutual, Judge Kibbey, formerly a governor of Arizona, appeared for the defendant, the Arizona Trust.

After the hearing, Judge Morrow announced that he would grant the injunction and give the Arizona Trust Company thirty days in which to file a bond of \$10,000 as a surety that the Arizona Trust Company would pay to each of the intervening stockholders of the Mutual the money they have heretofore paid into the Mutual, together with interest to date. The court announced that in the event the Arizona Trust did not comply with the order of the court, he would appoint a receiver for both companies.

If, however, the intervenors show that misrepresentations have been made to them in the conduct of the business, a receiver will be appointed for the Arizona Mutual Company. This case was instituted in the federal court of Arizona by C. W. Clark, a resident of California, and immediately following the filing of the petition, thirty other stockholders of the Arizona Mutual Loan and Savings Company filed a petition to intervene. It is understood that since the case was first taken up before Judge Morrow on Saturday last at Los Angeles, the Ari-



zona Trust Company settled with Mr. Clark, but the basis of the settlement is not known. Following the settlement, the application of the intervenors, however, was not dismissed, but the case was heard on its merits and the above decision rendered.

(Reprint from Arizona Gazette, Wednesday, August 7, 1912).

In addition to the matters herein set forth early in the month of September, 1912, W. T. Smith, the then President of the defendant Loan Association, caused to be mailed to all of the stockholders in said company among others, particularly to those described as Class One herein the following notice:

## ARIZONA TRUST COMPANY

Phoenix, Arizona.

To the Stockholders Arizona Mutual Savings & Loan Assn., Arizona Trust Company:

In June last, a suit was instituted in the State Superior Court here by a stockholder of the Arizona Mutual Savings & Loan Assn., asking for the appointment of a receiver of these companies. This suit failed and a similar one has been instituted in the Federal Court here, which will come up for trial in the near future. Before the trial of this case it will be necessary for me to have the views of the stockholders as to what course to pursue for the best interests of all

Therefore a meeting of the stockholders of the

Arizona Mutual Savings & Loan Assn. and the Arizona Trust Company is hereby called to meet in the office of the Arizona Trust Company, 200 W. Washington St., in the City of Phoenix, Arizona, on September 5th, 1912, at ten o'clock a. m. This meeting is an informal one for the purpose of conference only.

I would like a full attendance at this meeting, so please come if you can, and if you cannot come yourself designate some other stockholder in your vicinity as your proxy who will personally attend as your representative. A blank form of proxy is enclosed for that purpose.

The importance of this meeting should require your prompt attention to this letter. It means a great deal to you. Yours very truly,

ARIZONA TRUST COMPANY,

President.

And thereafter, the said W. T. Smith on September 17, 1912, or thereabout, caused the following notice to be sent to many of the said stockholders:

ARIZONA TRUST COMPANY

Phoenix, Arizona.

Sept. 17, 1912.

Dear Sir:—

The publicity given lately to the litigation which has been going on in connection with our company has brought me so many letters asking for information in regard to our present status that I find it very difficult to reply promptly to them with

the fullness to which they are entitled. I am, therefore, taking this means of a circular letter to answer yours among others.

The stockholders' meeting held here on the 5th inst. was very successful as regards the object for which it was called, the great bulk of the stock being represented either in person or by proxy and the discussions and explanations evidently helping to bring about the better understanding which was so much wanted. The meeting, as you know, was for conference only, but the expression of opinion was overwhelmingly in favor of the continuance of the company's affairs in the hands of the present management, recently begun.

The litigation has been temporarily settled by the court's appointment of a receiver to take charge of the assets which had already been set aside for the protection of those stockholders of the old Mutual Savings & Loan Association who had not cared to transfer into the Trust Company. The Trust Company itself (despite the very much mixed-up report of a fool reporter in one of the local papers) is not affected.

Our position has been greatly strengthened lately by the report of the examiners appointed by the Corporation Commission. In the summary of that report, which you will find in a copy of the "Democrat" mailed to you today, you will see that the Trust Company so far from being of doubtful solvency possesses assets to the extent of \$150 for every \$100 of preferred stock.

You will please remember that for anything

that has been done in the past by those in control of this company I am in no way responsible. my connection with its management dating back less than two months; but I am now ready and able to protect the money I have in it—and in so doing I will protect yours. There is one hundred cents to the dollar for everybody; and if we could once get these lawsuits cleared up and definitely settled so that we could get started to business again in earnest, it would only be a short time before everybody who wanted to get his money out could do so without any trouble or loss whatever.

If you have any doubt about me please inquire at any bank or financial institution in Phoenix. I will take my chance on the report of my neighbors.

Yours truly,

(Signed) W. T. SMITH,

President.

Upon information and belief, I further allege that between July, 1912, and September, 1912, the exact date of which I do not know, the said W. T. Smith caused to be sent the following notice to each and all of the stockholders:

## ARIZONA TRUST COMPANY

Phoenix, Arizona.

To the Stockholders of the Arizona Trust Company.

No doubt you received one of the letters circulated by one A. C. Le Baron, who was formerly connected with this company and also identified with

the Arizona Mutual Savings & Loan Association. This gentleman, since severing his connection with these companies has apparently gone out of his way to mischievously and unduly excite the shareholders and create a feeling of unrest among them. I say mischievously, because there cannot possibly be any other motive actuating such a letter.

If he was in a position to assist you in any manner, an effort to do so would be commendable indeed. While he was an officer of this company he drew out \$3600.00 in cash since Sept. 1, 1911, and has but recently sued the company for about \$15,000.00 more or less for his services (?) in securing the transfer of the shares of the Arizona Mutual Savings & Loan Association stock in the Trust Company. This can scarcely be said to be in perfect harmony with his desire to help you now. It occurs to me that if he was still an officer of the company, he might not have to resort to the slow process of the law to help you by taking his \$15,000.00 or more from you as stockholders. His purpose whatever it is means nothing but destruction to the company.

Now, I am a newcomer into the Trust Company, and am not justifying the acts of its former officers nor am I responsible for them. But my sole object now is to straighten out its affairs and make every **dollar** invested in it worth a **dollar**—and then some. My money is behind yours and if I can find even the passive support of my partners—for we are all partners in this concern—I will accomplish this very thing. But, of course, I can not be expected to do this if I cannot get the support of those who are most interested and from whom I naturally expect support.



I will not ask anyone for more money. I'll furnish the money. All I want is your confidence and some patience while I am working this thing out.

As to who I am, you may write any bank or financial institution in Phoenix.

Thanking you in advance for your co-operation,  
I, am,

Yours truly,  
ARIZONA TRUST COMPANY,  
(Signed) W. T. SMITH,  
President.

I further allage upon information and belief that in the latter part of July, 1912, or in the early part of August, 1912, the said W. T. Smith caused the following typewritten statesent to be put in circulation among certain of the stockholders of the defendant Trust Company. and that statement last referred to is as follows:

The undersigned shareholders in the Arizona Trust Company, of Phoenix, Arizona, who were shareholders and members of the Arizona Mutual Savings & Loan Association and who have transferred our respective shares therein for shares of the preferred capital stock of the Arizona Trust Company and also shareholders of the Arizona Mutual Savings & Loan Association, who have not transferred their shares, having been informed of the suit of some of the stockholders to have a receiver appointed for the Arizona Mutual Savings & Loan Association and to set aside the transfers

which have been made by some of the Arizona Mutual Savings & Loan Association shareholders for stock in the Trust Company, desire hereby to express our satisfaction and approval of the manner in which such transfers of shares were made and to declare our absolute confidence in the present management of the Arizona Trust Company, and their ability to consummate the plans and purposes for which the company was organized.

We are opposed to the appointment of a receiver and believe that such an action would be ruinous and result in a great, if not a total, loss to all of us.

That K. M. Schade, John A. Hampton, Richard Stephens, Wade Hampton, J. M. Welsh, Mrs. M. P. Campbell, Victor Willits, Curry H. Love, Seaman & Perry, John McCartan, H. E. Dugan, Joe Conley, Mrs. W. W. Webb, by W. W. Webb, Mrs. L. B. Morris, by W. W. Webb, F. E. Murphy, T. A. Sanders, I. W. Wallace, T. E. Warlop, E. Marks, Frank S. Douglas, A. J. Shropshire, by A. S. J. S., F. T. Pomeroy, Artimus Millett, Artimus B. Millett, B. A. Leak, T. N. Clanton, H. E. Kell, D. P. Jones, C. H. Schulz, J. W. Francis, Thos. A. Rickel, Fred Hensing, B. Hock, Aug. P. Neu, Aug. Johnson, F. W. Smakel purported to sign one of the statements so circularized as aforesaid.

It appears from the records of this court on file in the City of Phoenix, that on or about April 14, 1913, the Honorable William W. Morrow heard argument on a motion of the petitioners named in the petition filed herein April 5, 1913, for leave to intervene and upon the hearing of said motion de-

nied each of said persons leave to intervene in the above entitled cause upon the ground that the said petition and intervention did not contain facts sufficient to entitle said petitioners or intervention the right to intervene.

About the first week in June, 1913, the Receiver herein declared and paid a dividend of ten (10) per cent to each of the persons named in the final decree herein on February 27, 1913, and I am now informed by the said Receiver that he has in his possession approximately Twelve or Thirteen Thousand Dollars available for the purpose of paying the liens established and fixed by the terms of the final decree of February 27, 1913, and that due to the filing of the petition intervention herein by Benton Dick, Esquire, and Messrs. Morrison, on July 15, 1913, and to a request made upon the Receiver by said attorneys not to declare or pay any further dividends on account of the final decree of February 27, 1913, until the application of Mr. Dick's clients to intervene through their petition of July 15, 1913, could be heard and disposed of, he preferred not to make any further payments under the decree unless instructed so to do by the Court, and that for this reason alone no further dividends will be declared unless so instructed by the Court.

C. L. NABERS.

Subscribed and sworn to before me this 29th day of July, 1913.

B. L. RUDDEROW,

Notary Public.

My commission expires Sept. 26, 1916.

UNITED STATES OF AMERICA, DISTRICT OF  
ARIZONA, SS.

I, George W. Lewis, Clerk of the United States District Court for the District of Arizona, do hereby certify that the above and foregoing is a true, perfect and complete copy of the affidavit of C. L. Nabers, verified July 29, 1913, and duly filed herein in the cause of Charles W. Clark, complainant, vs. Arizona Savings and Loan Association and Arizona Trust Company, defendants, being cause Equity No. 53 in this court

Witness my hand and the seal of said court affixed this 23rd day of February, A. D. 1915.

GEORGE W. LEWIS, Clerk.

By R. E. L. WEBB, Deputy Clerk.

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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McGOLDRICK LUMBER COMPANY, a Corporation,  
tion,

Appellant,

vs.

CHARLES J. KINSOLVING and JANE DOE  
KINSOLVING, MILWAUKEE LUMBER  
COMPANY, a Corporation, LYN LUND-  
QUIST and ELIX LINDQUIST,

Appellees.

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Transcript of Record.

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Upon Appeal from the United States District Court  
for the District of Idaho, Northern Division.

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Filed

NOV - 6 1914

F. D. Monckton,  
Clerk.



**Argued and submitted**

NOV. 9 - 1914

**at San Francisco.**

2 Briefs.

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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McGOLDRICK LUMBER COMPANY, a Corporation,  
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Appellant,

vs.

CHARLES J. KINSOLVING and JANE DOE  
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COMPANY, a Corporation, LYN LUND-  
QUIST and ELIX LINDQUIST,

Appellees.

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Transcript of Record.

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Upon Appeal from the United States District Court  
for the District of Idaho, Northern Division.

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**[Names and Addresses of Attorneys of Record.]**

CULLEN, LEE & MATTHEWS, Spokane,  
Wash.,

F. M. DUDLEY, Seattle, Wash.,

JOHN P. GRAY, Coeur d'Alene, Idaho,  
Attorneys for Appellants.

FORNEY & MOORE, B. F. NORRIS, Moscow,  
Idaho,  
Attorneys for Respondents.

---

*In the Circuit Court of the United States, Ninth Cir-  
cuit, District of Idaho, Northern Division, Hold-  
ing Terms at Coeur d'Alene.*

McGOLDRICK LUMBER COMPANY,  
Complainant,  
vs.

CHARLES J. KINSOLVING and JANE DOE  
KINSOLVING (Whose Real Name is Un-  
known), His Wife, MILWAUKEE LUM-  
BER CO., a Corporation,  
Defendants.

**Complaint.**

BILL OF COMPLAINT OF THE McGOLDRICK  
LUMBER CO., A CORPORATION, EXHIB-  
ITED AGAINST THE DEFENDANT  
ABOVE NAMED, CHARLES J. KINSOLV-  
ING AND JANE DOE KINSOLVING  
(WHOSE REAL NAME IS UNKNOWN),  
HIS WIFE, MILWAUKEE LUMBER CO., A  
CORPORATION.

To the Honorable Judges of the Circuit Court of the United States of the Ninth Circuit, in and for the District of Idaho, Northern Division, in Equity Sitting:

The McGoldrick Lumber Co., a corporation of the State of Washington, and a resident and citizen of the said State, brings this its bill of complaint against Charles J. Kinsolving and Jane Doe Kinsolving (whose true name is unknown), his wife, and Milwaukee Lumber Co., all citizens of the State of Idaho, residing at St. Maries, Kootenai County, Idaho, and respectfully shows unto your Honors: [1\*]

I.

That the above-named complainant, McGoldrick Lumber Co., is a corporation organized and existing under and by virtue of the laws of the State of Washington, and now is and during all the times hereafter mentioned was a citizen and resident of the said State of Washington.

II.

That the above-named defendants, Charles J. Kinsolving and Jane Doe Kinsolving (whose true name is unknown), his wife, and each of them were, and now are, and during all the times hereinafter mentioned have been citizens and residents of the State of Idaho, living and residing at St. Maries, in the County of Kootenai and State of Idaho, and the Milwaukee Lumber Company is an Idaho corporation, and a citizen and resident of said State.

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\*Page-number appearing at foot of page of original certified Record.

## III.

That the subject matter of this suit consists of real estate situated in the County of Shoshone, and State of Idaho, which is hereafter more particularly described, and the value thereof exceeds the sum of Five Thousand (\$5,000.00) Dollars, and the matter here in dispute, exclusive of costs and interest, exceeds the said sum of Five Thousand (\$5,000.00) Dollars.

## IV.

That on the 26th day of September, 1906, one John Shannon, being then and there a citizen and resident of the State of Idaho, and a citizen of the United States, and of lawful age, made and filed with the register of the United States Land Office for the District of Idaho, in Coeur d'Alene, Idaho, his written statement in duplicate designated by proper legal subdivisions for entry under the laws of the United States for cash purchase of timber and stone lands being the Act of Congress of June 3, 1878, Chapter 151, 20 Statutes at Large, page 89, the South Half of the Northwest Quarter (S.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$ ), the Southwest Quarter of the [2] Northeast Quarter (SW.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$ ), the Northeast Quarter of the Southwest Quarter (NE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ ), of Section Nine (9), Township Forty-four (44) North, Range Three (3) East of the Boise Meridian, in Shoshone County, Idaho, setting forth that the same was unfit for cultivation, and valuable chiefly for its timber, that it was uninhabited, that it contained no mining or other improvements as far as said applicant knew, nor any valuable deposits of gold, silver, cinnabar, copper or



coal; that applicant had made no other application under the said act, and that he did not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he had not directly or indirectly made any agreement or contract in any way or manner with any person or persons whatsoever by which the title which he acquired from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself, which said statement was verified by the oath of said applicant, John Shannon, on the said day before the register of said land office at Coeur d'Alene, Idaho, being the district wherein the said land was situated, and the said John Shannon thereupon complied with all the provisions of the Act of Congress in regard to timber and stone lands, being the Act of Congress of June 3, 1878, Chapter 151, 20 Statutes at Large, page 89, a copy of which said entry is hereunto attached marked Exhibit "A" and expressly made a part hereof, and was at said time and place in all ways qualified to and did enter the said lands under the said act, and the said lands were at said time and place unappropriated public lands of the United States open to appropriation under and by virtue of said act, and were lands unfit for cultivation and valuable chiefly for timber situated thereon, and were uninhabited and containing no mining or other improvements, and contained no valuable deposits of gold, silver, cinnabar, [3] copper or coal.

V.

That thereupon the register of the said land office

duly posted a notice of such application for the entry for purchase of the land by legal subdivisions in his office for a period of sixty (60) days, and the said applicant, John Shannon, caused a copy thereof to be published for the full period of sixty (60) days in a newspaper published nearest the location of the said premises, and thereafter and on the 16th day of January, 1907, the said applicant, John Shannon, made his proof before the said register, that the land was of the character contemplated by the said act, unoccupied and without improvements, and that it apparently contained no valuable deposits of gold, silver, cinnabar, copper or coal, and thereupon paid unto the said receiver of the said land office, the sum of Four Hundred (\$400.00) Dollars, together with the fees of the register and receiver as provided by law for making the said entry, and thereupon received from the said Receiver of the United States Land Office at Coeur d'Alene, Idaho, Receiver's Receipt for the said land numbered "Timber & Stone Entry No. 2500," a copy of which is hereunto attached marked Exhibit "B," and expressly made a part hereof.

And your orator alleges that the said John Shannon then and there complied in all ways with the laws of the United States covering the entry of the said lands under the said Act, and the said entry so made by the said Shannon was a valid and legal entry and purchase of the said land by the said John Shannon, and your orator shows unto your Honors that said John Shannon thereupon became and was in equity the owner of said land and entitled to have is-

sued and delivered to him letters patent under the seal of the United States conveying unto him, his heirs and assigns, the legal title to said land in fee simple absolute.

## VI.

That thereafter and on the 25th day of April, 1907, one [4] Roy C. Lammers, being then and there a citizen of the United States and a citizen and resident of the State of Washington, acting as the agent of your orator, purchased the said land from the said entryman, John Shannon, for the sum of Eight Thousand (\$8,000.00) Dollars, lawful money of the United States of America, which the said Roy C. Lammers then and there paid over and unto the said John Shannon, and the said John Shannon then and there conveyed by warranty deed, the said land unto the said Lammers, a copy of which said deed is hereunto attached marked Exhibit "C," and expressly made a part of this bill of complaint, and the said Lammers then and there took the said title as trustee for your orator, and thereafter and on or about the — day of May, 1907, the said Roy C. Lammers conveyed the said land to your orator, the McGoldrick Lumber Co., and your orator ever since said time has been and now is in equity the owner of the said land and entitled to the possession thereof, and entitled to receive and be vested with the legal right to the said land by and through a conveyance of the said legal title from the United States of America by and through its proper officers to the said John Shannon.

## VII.

And your orator further avers that your orator in

purchasing the said land from the said John Shannon was a *bona fide* purchaser for value of said land without notice of any defect whatsoever in the said title, and in making said purchase relied upon the entry of the same and upon the Receiver's Receipt issued to the said John Shannon by the Receiver of the United States Land Office at Coeur d'Alene, Idaho, on the 16th day of January, 1907. [5]

### VIII.

That thereafter and on the 16th day of July, 1907, the above-named defendant, Charles J. Kinsolving made and filed in the United States Land Office at Coeur d'Alene, Idaho, his affidavit of contest against the said entry of the said lands by the said John Shannon which is in words and figures as, to wit:

“State of Idaho,  
County of Kootenai,—ss.

Charles J. Kinsolving, being first duly sworn, deposes and says:

That on or about the 17th day of July, 1905, at the Coeur d'Alene, Idaho, land office, John Shannon made homestead entry for the S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 9, in Township 44, North of Range 3 East, B. M., and that thereafter the said Shannon made application to offer final proof on said homestead as a commutation cash entry, which said application was duly and regularly published; that on the day set for offering said final proof, to wit, on the 26th day of September, 1906, the said Shannon relinquished said land to the Government of the United States, and thereafter, on the 26th day of September, 1906, made application, un-



der the timber and stone act, to purchase the same, which said application and certificate is number 2500; that on the 16th day of January, 1907, said Shannon offered and submitted his proof for said land, and, after the same had been submitted your Receiver of the Coeur d'Alene, Idaho, Land Office, issued to him a receipt and certificate of purchase Number 2500.

That on the 24th day of September, 1906, the said John Shannon made, executed and entered into a written agreement with one William McCarter, under and by the terms of which, he, the said Shannon was to deed and convey to the said William McCarter an undivided one-half interest in and to the land sought to be purchased as aforesaid, when he, the said Shannon, had submitted his [6] final proof and received the Receiver's Receipt therefor; that said written contract and agreement was recorded in the office of the County Recorder of Shoshone County, Idaho, on the 21st day of January, 1907, in Book 'E' of Agreements.

That after said Shannon had submitted his final proof and received your Receiver's Receipt therefor, he, the said Shannon, made and executed deed conveying said land to one Joseph H. Johnson, who, as affiant is informed and believes, subsequently conveyed said land to Roy C. Lammers and the McGoldrick Lumber Company, a corporation; that in paying to the Government of the United States the purchase price for said land, the money therefor was furnished to the said Shannon by other parties in consideration of the said Shannon giving to party fur-



nishing said money a part of the consideration which he was to receive from the said Roy C. Lammers and the McGoldrick Lumber Company; that when the consideration for said conveyance as aforesaid was paid, the said Shannon did not receive more than one-third thereof, the balance having been paid to the parties who had furnished him the money to make final proof.

Affiant further alleges upon information and belief, that the consideration paid by said Roy C. Lammers and the McGoldrick Lumber Company, for said land, was the sum of Eight Thousand (\$8,000.00) Dollars, and that the said Shannon did not receive more than Two Thousand Dollars (\$2,000.00) thereof.

That all of the matters herein alleged are matters of record within the United States Land Office and the Office of the County Recorder of Shoshone County, Idaho, and are within the knowledge of the special agents representing the Government of the United States. [7]

On account of the matters and things above set forth affiant alleges, that said timber and stone entry No. 2500 was made for speculative purposes and not for the sole and exclusive benefit of said applicant, John Shannon, and that said John Shannon, by reason of his agreements and contracts as aforesaid, did not receive the full consideration and value of said land.

CHARLES J. KINSOLVING.

Subscribed and sworn to before me this 16th day of July, 1907.

S. L. McFARLAND,  
Notary Public in and for Kootenai County, Idaho."

And the said register of the said land office thereupon gave notice as required by law that a hearing of the said charges would be had in his office at Coeur d'Alene, Idaho, on the 13th day of May, 1908, a copy of which said notice is hereunto attached marked Exhibit "D" and made a part of this complaint; and thereafter and on the 21st day of May, 1908, in accordance with the said notice, the parties to the said contest including the said John Shannon and the said Roy C. Lammers, and the said defendant Charles J. Kinsolving and your orator, the McGoldrick Lumber Co., appeared before the register and receiver of the said land office at Coeur d'Alene, Idaho, and proof was duly introduced in behalf of the said contestant, Charles J. Kinsolving and in behalf of the said entryman, John Shannon, and in behalf of the said Roy C. Lammers and your orator, the McGoldrick Lumber Company, as purchaser of said land from said entryman, John Shannon, a copy of which said proof and of which said proceedings is hereunto attached, marked Exhibit "E" and expressly made a part of this bill of complaint. And thereafter and on or about the — day of —, 1908, the said register and receiver of the United States Land Office at Coeur d'Alene, Idaho, filed their written decision supporting the [8] affidavit of contest of the said defendant, Charles J. Kinsolving, and cancelling the entry of the said entryman, John Shan-

non, a copy of which said decision is hereunto attached, marked Exhibit "F," and expressly made a part of this bill of complaint.

### IX.

That at the beginning of said proceedings before the said register and receiver your orator demurred to the petition on file or the contest affidavit upon the ground that the statements therein made were insufficient to support the contest or any order with reference to said entry looking to the cancellation thereof and objected to the said register and receiver hearing any proof or taking any testimony in regard thereto, upon the said grounds, which said demurrer and objection said register and receiver overruled and permitted the said contestant to introduce testimony to the manifest injury of your orator and against its rights, and thereby in overruling the said demurrer and objection to the taking of testimony the said register and receiver committed an error of law to the prejudice of the rights of your orator.

### X.

And your orator further shows unto your Honors that at said hearing said contestant offered in evidence a certified copy of the contract between the entryman John Shannon and William McCarter, which said contract is attached to the evidence taken before said register and receiver hereunto attached marked "Exhibit 'A' for identification to testimony before receiver," and your orator objected to the introduction of the same upon the ground set forth in said copy of said proof hereunto attached as Exhibit "E," and the said register and receiver sus-

tained your orator's said objection to the admission of said document in evidence and refused to admit the same, but that in making and rendering their said decision [9] said register and receiver treated and considered said pretended contract between the said Shannon and said McCarter as if the same had been admitted in evidence at said hearing and utterly and totally ignored the fact that said pretended contract had when offered in evidence been rejected, and in so considering and treating said contract as if admitted in evidence, said register and receiver erred in law to the prejudice of the rights of your orator.

And your orator further shows that at the conclusion of the testimony of the contestant given before the said register and receiver, and after the said contestant had rested his said case, your orator moved the said register and receiver to dismiss the said contest, for the reason that there had been no evidence introduced that would in any way affect the entry made by said entryman John Shannon on the said land, and that the said evidence of the said contestant clearly showed that the said John Shannon acted at all times within his rights and had made no contract or agreement to convey any part or interest in the said land, and also that said evidence was wholly insufficient to justify the cancellation of the said entry, but the said register and receiver overruled the said motion to dismiss and thereby erred in law to the prejudice of the rights of your orator.

And your orator further shows that at the conclusion of all the testimony before the said register and receiver your orator renewed its motion to dismiss



the said proceedings upon the said grounds, but the said register and receiver overruled the said motion and refused to dismiss the same, and thereby erred in law to the prejudice of the rights of your orator.

And your orator further shows that in making and rendering said decision said register and receiver wrongfully and unlawfully ignored the evidence adduced at said hearing, and without any testimony whatever to support such finding, found that said [10] entry was made for speculative purposes and not for the sole and exclusive benefit of said applicant. That in truth and in fact there is not a scintilla of evidence to support or justify such finding, or any finding whatsoever, that said entry when made by said Shannon, to wit, on September 26, 1906, was made otherwise than for his sole and exclusive use and benefit. That in making said finding said register and receiver misconstrued and misinterpreted the law applicable to such case, in this, to wit, that said register and receiver failed and refused to hold that as a matter of law the contestant was bound to show by evidence that such entry was made for speculative purposes and not for the sole and exclusive benefit of the said Shannon, and said register and receiver held that they, as a matter of law, were authorized and empowered to, and had jurisdiction to find that such entry was made for speculative purposes and not for the sole and exclusive use and benefit of said Shannon totally without evidence to support such finding and upon ungrounded suspicions existing solely in their own minds.

That by reason of said errors and misconstruction



of the law the said register and receiver were induced to and did make and render their said decision. That but for said errors and misconstruction of the law said register and receiver would have dismissed said contest, and letters patent conveying the legal title to said land to said Shannon would have been issued and delivered by the United States of America by and through its proper officers to the said entryman John Shannon, and your orator would thereby have become vested with the said legal title to the said land.

### XI.

That thereafter and within the time provided by law your orator appealed from the decision of the said register and receiver of the United States Land Office at Coeur d'Alene, Idaho, [11] to the Commissioner of General Land Office, and thereafter and on the 29th day of May, 1909, the Commissioner of said General Land Office affirmed the decision of the register and receiver of the United States Land Office at Coeur d'Alene, Idaho, a copy of which said decision affirming the same is hereunto attached marked Exhibit "G," and expressly made a part hereof.

### XII.

That in making and rendering his said decision said Commissioner of the General Land Office treated and considered the said pretended contract between the said Shannon and said McCarter as if the same had been admitted in evidence at said hearing, and was influenced therein by the decision of the register and receiver of the local land office and

utterly and totally ignored the fact that said pretended contract had when offered in evidence been rejected, and in so considering and treating said contract as if admitted in evidence said Commissioner of the General Land Office erred in law to the prejudice of the rights of your orator.

And your orator further shows that in making and rendering said decision said Commissioner of the General Land Office wrongfully and unlawfully ignored the evidence adduced at said hearing and without any testimony whatsoever to support such finding, found that said entry was made for speculative purposes and not for the sole and exclusive benefit of said applicant. That in truth and in fact there was not a scintilla of evidence to support or justify such finding or any finding whatsoever that said entry when made by the said Shannon, to wit, on September 26, 1906, was made otherwise than for his sole and exclusive use and benefit. That in making said finding said Commissioner of the General Land Office misconstrued and misinterpreted the law applicable in such cases, in this, to wit, that said register and receiver failed and refused to hold that as a matter of law the contestant was bound to show by evidence that such entry was made [12] for speculative purposes and not for the sole and exclusive use and benefit of the said Shannon, and said Commissioner of the General Land Office held that he, as a matter of law, was authorized and empowered to and had jurisdiction to find that said entry was made for speculative purposes and not for the sole use and benefit of said Shannon totally without

evidence to support such finding and upon ungrounded suspicion existing solely in his own mind and in the minds of the register and receiver in the local land office.

That by reason of said errors and misconstruction of the law the said Commissioner of the General Land Office was induced to and did make and render his said decision affirming the decision of the local land office. That but for said errors and misconstruction of the law said Commissioner of the General Land Office would have dismissed said contest, and letters patent conveying the legal title to the said land to said Shannon would have been issued and delivered by the United States of America by and through its proper officers, and your orator would thereby have become vested with said legal title to the said premises.

### XIII.

That thereafter and within the time provided by law your orator appealed from the decision of the Commissioner of the General Land Office to the Secretary of the Interior, and thereafter and on the 10th day of May, 1910, the Secretary of the Interior filed his decision affirming the decision of the Commissioner of the General Land Office and of the Register and Receiver of the United States Land Office at Coeur d'Alene, Idaho, a copy of which said decision is hereunto attached marked Exhibit "H" and expressly made a part hereof. [13]

### XIV.

That in making and rendering his said decision said Secretary of the Interior treated and consid-

ered the said pretended contract between the said Shannon and said McCarter as if the same had been admitted in evidence at said hearing, and was influenced therein by the decision of the register and receiver of the *local and* utterly and totally ignored the fact that said pretended contract had when offered in evidence been rejected, and in so considering and treating said contract as if admitted in evidence said Secretary of the Interior erred in law to the prejudice of the rights of your orator.

And your orator further shows that in making and rendering said decision said Secretary of the Interior wrongfully and unlawfully ignored the evidence adduced at said hearing and without any testimony whatsoever to support such finding, found that said entry was made for speculative purposes and not for the sole and exclusive benefit of said applicant. That in truth and in fact there was not a scintilla of evidence to support or justify such finding or any finding whatsoever that said entry when made by the said Shannon, to wit, on September 26, 1906, was made otherwise than for his sole and exclusive use and benefit. That in making said finding said Secretary of the Interior misconstrued and misinterpreted the law applicable to such cases, in this, to wit, that said register and receiver failed and refused to hold that as a matter of law the contestant was bound to show by evidence that such entry was made for speculative purposes and not for the sole and exclusive use and benefit of the said Shannon, and said Secretary of the Interior held that as a matter of law he was authorized and empowered to and had



jurisdiction to find that said entry was made for speculative purposes and not for the sole use and benefit of said Shannon totally without evidence to support such finding and upon ungrounded suspicion existing solely in his [14] own mind and in the minds of the register and receiver in the local land office.

That by reason of said errors and misconstruction of the law the said Secretary of the Interior was induced to and did make and render his said decision affirming the decision of the local land office. That but for the said errors and misconstruction of the law said Secretary of the Interior would have dismissed said contest, and letters patent conveying the legal title to the said land to said Shannon would have been issued and delivered by the United States of America by and through its proper officers, and your orator would thereby have become vested with said legal title to the said premises.

### XV.

That thereafter and on the 25th day of October, 1910, the said defendant Charles J. Kinsolving filed a lien selection of the said land by virtue of scrip issued to the Santa Fe Pacific Railway Company in accordance with the Act of Congress of June 4, 1897, and received therefor receiver's receipt covering the said land numbered 06636, and thereafter and on the 27th day of March, 1911, the United States by and through its legally constituted officers, pursuant to said application and proof made, made and caused to be delivered to said defendant Charles J. Kinsolving, patent of the said South Half of the Northwest



Quarter (S.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$ ), the Southwest Quarter of the Northeast Quarter (SW.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$ ), the Northeast Quarter of the Southwest Quarter (NE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ ), of Section Nine (9), Township Forty-four (44) North, Range Three (3) East of the Boise Meridian, in Shoshone County, Idaho, and that from and since said date the said above-named defendants, Charles J. Kinsolving and Jane Doe Kinsolving (whose true name is unknown), his wife, have held the legal title to the said premises, and the whole thereof under the said patent, and are still so holding [15] said title.

## XVI.

Your orator further alleges that the register and receiver of the United States Land Office at Coeur d'Alene, Idaho, erred in holding that the said timber and stone entry No. 2500 made by the contestee, John Shannon, for the land in controversy in the contest filed by the said defendant, Charles J. Kinsolving, was made for speculative purpose, and not for the sole and exclusive benefit of the said John Shannon, and erred in holding said entry for cancellation, and the said Commissioner of the General Land Office and the Honorable Secretary of the Interior erred in affirming the decision of the said register and receiver, and in holding that said entry No. 2500 should be cancelled, and each and every act of the said officers in regard to the same was, and is against the laws of the United States, and the said officers, and each and all of them, should have decided in favor of the entryman, John Shannon, and in support of the title of your orator.

XVI<sup>1</sup>/<sub>2</sub>.

That the Milwaukee Lumber Co. claims some interest in said property, the exact nature and extent of which is to your orator unknown.

## XVII.

That your orator has no speedy, adequate or complete remedy at law, or any remedy at law in the premises.

## XVIII.

That your orator desires to obtain legal title to said premises as hereinbefore alleged from the United States of America under the entry heretofore made by the said entryman, but that it is impossible for it so to do so long as there is outstanding the patent of the United States for said lands as hereinbefore set forth. [16]

IN CONSIDERATION WHEREOF, and for as much as your orator is remediless in the premises, at and by the strict rules of common law, and can only have relief in a court of equity, where matters of this nature are properly cognizable and relievable;

May it please your Honors to grant unto your orator a writ of subpoena to be directed to the said Charles J. Kinsolving and Jane Doe Kinsolving (whose true name is unknown), his wife, of St. Maries, Kootenai County, Idaho, and Milwaukee Lumber Co., citizens and residents of the said State of Idaho, as hereinbefore shown, thereby commanding them and each of them at a certain time and at a certain penalty therein to be limited, to personally appear before your Honors and then and there full,

true, direct and perfect answer make to all and singular the premises, but not under oath (an answer under oath being hereby expressly waived); and further to stand to and abide such further order, direction or decree herein as to your Honors shall seem meet and proper.

That it may be decreed by your Honors that your orator is the owner of the said South Half of the Northwest Quarter (S.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$ ), the Southwest Quarter of the Northeast Quarter (SW.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$ ), the Northeast Quarter of the Southwest Quarter (NE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ ), of Section Nine (9), Township Forty-four (44) North, Range Three (3) East of the Boise Meridian, in Shoshone County, Idaho, and that the defendants be decreed to be the holders of the title by, through and under the patent of the United States so far as the same relates to the said land in trust, however, for your orator, this complainant, and for its uses and benefit, and that the said defendants be required by said decree to convey to your orator, its successors or assigns, said premises and the whole thereof, and that said title of said defendants in and to said property existing under and by virtue of the said patent be cancelled and annulled, and that your orator be permitted to make application for patent to the said premises [17] under the provisions and laws of the United States covering the entry hereinabove set forth.

That the defendants and each of them be restrained and enjoined by order of this Court from encumbering or disposing of said premises, or any interest therein, pending the final determination of

this action, and that there be granted to your orator such other and further relief as shall be meet, right and equitable in the premises, and that your orator recover of defendants its costs and disbursements herein.

McGOLDRICK LUMBER CO.

By ROY C. LAMMERS.

F. M. DUDLEY,

CULLEN, LEE & FOSTER,

Solicitors for Complainant, 500 Traders Bank Bldg.,  
Spokane, Wash.

United States of America,

State of Washington,

County of Spokane,—ss.

Roy C. Lammers, being first duly sworn, on oath deposes and says: That the above-named complainant, The McGoldrick Lumber Co., is a corporation organized and existing under and by virtue of the laws of the State of Washington, and he is officer thereof, to wit, its Superintendent; that he has read the foregoing bill of complaint, and knows the contents thereof, and the same is true except as to those matters therein stated to be upon information and belief, and as to those he believes them to be true.

ROY C. LAMMERS.

Subscribed and sworn to *before this* 19th day of September, A. D. 1911.

[Seal]

W. E. CULLEN, Jr.,

Notary Public in and for the State of Washington,  
Residing at Spokane. [18]



**Exhibit "A" [to Complaint—Application and Sworn  
Statement of John Shannon].**

DEPARTMENT OF THE INTERIOR.

TIMBER OR STONE ENTRY.

U. S. Land Office, Coeur d'Alene, Idaho, No. 0668.

Receipt No. ———

**APPLICATION AND SWORN STATEMENT.**

(To be made in Duplicate.)

I, John Shannon, hereby make application to purchase the South Half of the Northwest Quarter (S.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$ ), Northeast Quarter of the Southwest Quarter (NE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ ), Southwest Quarter of the Northeast Quarter (SW.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$ ), of Section Nine (9), Township Forty-four (44) North, Range Three (3) East of the Boise Meridian, containing 160 acres, within the Coeur d'Alene land district, in the State of Idaho, and the timber thereon, at such value as may be fixed by appraisal, made under authority of the Secretary of the Interior, under the act of June 3, 1878, commonly known as the "Timber and Stone Law," and acts amendatory thereof, and in support of this application I do solemnly swear that I am a native born citizen of the United States, of the age of 45 years, and by occupation a timberman; that I did, on September 1, 1906, examine said land, and from my personal knowledge state that said land is unfit for cultivation and is valuable chiefly for its timber; and that to my best knowledge and belief, based upon said examination, the land is worth ——— Dollars, and the timber thereon, which I estimate to be



——— feet, board measure, is worth ——— dollars, making a total value [19] for the land and timber of four hundred dollars, and no more; that the land is uninhabited; that it contains no mining or other improvements, nor, as I verily believe, any valuable deposit of gold, silver, cinnabar, copper, coal or other minerals, salt springs, or deposits of salt; that I have made no other application under said acts; that I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit, and that I have not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whomsoever, by which the title I may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except myself; that since August 30, 1890, I have not entered and acquired title to, nor am I now claiming, under an entry made under any of the nonmineral public land laws, an amount of land which, together with the land now applied for, will exceed in the aggregate 320 acres; that I am not a member of any association, or a stockholder in any corporation which has filed an application and sworn statement under said act; and that my postoffice address is St. Maries, Idaho, at which place any notice affecting my rights under this application may be sent.

I request that notice be furnished me for publication in the "St. Maries Gazette," a newspaper published at St. Maries, Idaho.

JOHN SHANNON.

Note.—Every person swearing falsely to the above affidavit will be punished as provided by law for such offense. (See Sec. 5392, R. S., below.)

In addition thereto, the money that may be paid for the land is forfeited, and all conveyances of the land, or of any right, title or claim thereto, are absolutely null and void as against the United States.

I hereby certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto, that affiant is to me personally known (or has been [20] satisfactorily identified before me by ——); that I verily believe affiant to be a qualified applicant and the identical person hereinbefore described, and that said affidavit was duly subscribed and sworn to before me, at my office in Coeur d'Alene, Kootenai County, Idaho, within the Coeur d'Alene land district, this 16th day of September, 1906.

R. N. DUNN,  
Receiver U. S. Land Office.

REVISED STATUTES OF THE UNITED  
STATES. Title LXX. CRIMES, CHAP. 4.

Sec. 5392. Every person who, having taken an oath before a competent tribunal, officer or person, in any case in which a law of the United States authorized on oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by fine of not more

than two thousand dollars, and by imprisonment at hard labor, not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed. (See Sec. 1750.)

Note.—In addition to the above penalty, every person who knowingly or wilfully in anywise procures the making or presentation of any false or fraudulent affidavit pertaining to any matter within the jurisdiction of the Secretary of the Interior may be punished by fine or imprisonment. [21]

**Exhibit "B" [to Complaint—Receipt, Dated  
January 16, 1907].**

Receiver's Office at Coeur d'Alene,  
No. 2500. Idaho, Jan. 16, 1907.

Received from John Shannon of Kootenai County, Idaho, the sum of Four Hundred dollars and no cents; being in full for the S.  $\frac{1}{2}$ , NW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  and NE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  of Section No. 9, in Township No. 44 N. of Range No. 3 E., B. M., containing 160 acres and no hundredths, at \$2.50 per acre.

\$400.00. C. D. WARREN,

Receiver.

\$3.10 testimony fee received. Number of written words, 1380. Rate per 100 words, 22 cents. \$10.00 fees collected for filing and acting on application.

U. S. Receiver's Receipt

to

John Shannon.

Recorded at the request of McGoldrick Lumber Co.  
Aug. 7, 1907, at 9 o'clock A. M., in Book "P" of

Miscellaneous, page 391, Records of Shoshone County, State of Idaho.

STANLEY P. FAIRWEATHER,

County Recorder.

By John P. Sheehy,

Deputy Recorder. [22]

**Exhibit "C" [to Complaint—Deed, Dated April 25, 1907, John Shannon to Roy C. Lammers].**

THIS INDENTURE, made this 25th day of April, 1907, between John Shannon, an unmarried man of St. Maries County, of Kootenai, Idaho, party of the first part, and Roy C. Lammers, of Spokane, County of Spokane and State of Washington, party of the second part, WITNESSETH:

That the said party of the first part, for and in consideration of the sum of One (\$1.00) Dollar, in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and the said party of the second part forever released and discharged therefrom, has granted, bargained, sold, remised, released, alienated, and confirmed, and by these presents do grant, bargain, sell, remise, release, alien and confirm, unto the said party of the second part, and to his heirs and assigns forever, all the following described lot, pieces or parcels of land, situated in the County of Kootenai, and State of Idaho, and known and described as follows, to wit:

South Half of the Northwest Quarter (S.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$ ), Southwest Quarter of the Northeast Quarter (SW.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$ ) and the Northeast Quarter of the Southwest (NE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ ) Quarter, of Section Nine (9), Township Forty-four (44) North,



of Range Three (3) East, Boise Meridian, containing one hundred sixty (160) acres according to the Government survey thereof. Together with all and singular the hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, claim or demand whatsoever of the said party of the first part, either in law or in equity, of, in and to the above bargained premises, with the hereditaments and appurtenances, to have and to hold the said premises above bargained and described, with the appurtenances, unto the said party of the second part, his heirs and assigns forever. [23]

And the said party of the first part, for his heirs, executors and administrators, do covenant, grant, bargain, and agree to and with the said party of the second part, his heirs and assigns, that at the time of ensealing and delivery of these presents he was well seized of the premises above conveyed as of a good, sure, perfect, absolute and indefeasible estate of inheritance in law and fee simple, and has good right, full power and lawful authority to grant, bargain, sell, and convey the same in manner and form aforesaid; and that the same are free and clear of all former or other grants, bargains, sales, liens, taxes, assessments, and incumbrances, of what kind or nature soever; and the above bargained premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every person or persons lawfully claiming or to

claim the whole or any part thereof, the said party of the first part shall and will warrant and defend.

IN WITNESS WHEREOF, The said party of the first part has hereunto set his hand and seal the day and year first above written.

JOHN SHANNON. (Seal)

State of Washington,  
County of Spokane,—ss.

I, W. E. Cullen, Jr., in and for said County, in the State aforesaid, do hereby certify that on this 25th day of April, 1907, personally appeared before me John Shannon, to me known to be the individual described in and who executed the within instrument, and acknowledged that he signed and sealed the same as his free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal, this 25th day of April, A. D. 1907.

W. E. CULLEN, Jr.,

Notary Public, Residing at Spokane, Washington. [24]

**Exhibit "D" [to Complaint—Notice of Hearing of Charges Re Application of John Shannon, etc.].**

*In the United States Land Office, Coeur d'Alene, Idaho.*

CHARLES J. KINSOLVING

vs.

JOHN SHANNON.

H. E. 2500 for the S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ ,  
NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 9, T. 44, 3 E., B. M.

In the above-entitled case, affidavit of contest by Charles J. Kinsolving against the above-mentioned cash entry by John Shannon, was filed in this office July 16th, 1907, in which it is alleged that prior to said cash entry on January 16th, 1907, and prior to the application of said Shannon for said land on September 26th, 1906, said Shannon

“Made, executed and entered into a written agreement with one William McCarter, under and by the terms of which he, the said Shannon was to deed and convey to the said William McCarter an undivided one-half interest in and to the land sought to be purchased as aforesaid, when he, the said Shannon, had submitted his final proof and received the Receiver’s receipt therefor; that said written contract and agreement was recorded in the office of the County Recorder of Shoshone County, Idaho, on the 21st day of January, 1907, in Book E. of agreements.

That after said Shannon had submitted his final proof, and received your Receiver’s receipt therefor, he, the said Shannon made executed deed conveying said land to one Joseph H. Johnson, who, as affiant is informed and believes, subsequently conveyed said land to Roy C. Lambers and the McGoldrick Lumber Company, a corporation that in paying the United States Government the purchase price for said land, the money therefor was furnished to said Shannon by other parties in consideration of the said

Shannon giving the party furnishing said money a part of the consideration which he was to receive from the said Roy C. Lammers and the McGoldrick Lumber Company; that when the consideration for said conveyance as aforesaid was paid, the said Shannon did not receive more than one-third thereof, the balance having been paid to the parties who had furnished him the money to make final proof.

Affiant further alleges upon information and belief that the consideration paid by the said Roy C. Lammers and the McGoldrick Lumber Company for said land, was the sum of Eight Thousand Dollars (\$8000.00), and that the said Shannon did not receive more than Two Thousand Dollars, \$2000 therefor."

Notice is hereby given that a hearing on said charges will be had in this office May 13th, 1908, at 10 o'clock A. M., when the parties hereto are called to appear and submit testimony therein.

Signed: R. N. DUNN,  
Register.

Dated Coeur d'Alene, Idaho, Feb. 28th, 08. [25]



**Exhibit "E" [to Complaint—Proceedings Had  
Before Register and Receiver May 21, 1908.]**

**KINSOLVING vs. SHANNON.**

	Direct.	Cross.	Re-direct.	Recross.	
Roy C. Lammers	4	10	16	16	17
Sam. L. McFarland	18				
John Shannon	19				
Chas. A. Kinsolving	26				
J. H. Shannon	28	34	36		
John Shannon	37	(Recalled)			
John Shannon					
Joseph Johnson	41	42	43	(Recalled)	
R. C. Lammers	43	(Recalled)			
R. T. Morgan	44				
Earl Sanders	50				
F. M. Dudley	52	56	[26]		

May 21, 1908.

By Mr. ELDER.—At this time comes John Shannon, the entryman and protestee in this case, and moves the Hon. Register and Receiver that these proceedings be dismissed and that no further action be taken therein for the reason that said action and proceeding was continued from the 13th day of May, 1908, at 10 o'clock A. M. until the 18th day of May, 1908, without the consent and against the wishes of this protestee, and that on the 18th day of May this protestee being ready and willing to proceed with his trial, that said cause was again continued without the consent of this protestee and against his wishes.

By Mr. DUDLEY.—For Roy C. Lammers and McGoldrick Lumber Co. I desire to demur to the petition filed, or contest affidavit, upon the ground that

the statements therein made are insufficient to support the contest or any order with reference to this entry.

By the REGISTER.—Motion to dismiss is denied.

By Mr. ELDER.—At this time appears John Shannon and reserving all his exceptions and rights under the motion and to the decision of the Hon. Register and Receiver on said motion heretofore made, at this time demurs to the affidavit filed herein for the reason that said affidavit does not state facts sufficient to constitute a proceeding or there are no facts stated sufficient to warrant the cancelling of said entry; that there are no allegations in said affidavit that any other party, other than the entryman, reserved any part of said land or any benefits therefrom.

2d: That said Charles J. Kinsolving is not a proper party contestant or protestant in this action, the title of said land having passed to John Shannon, the Government being the only party to protest said entry. [27]

By the REGISTER.—This motion is overruled for the reason that the sufficiency of the affidavit has been passed upon by the Commissioner of the General Land Office and the hearing ordered by him.

By Mr. McFARLAND.—Now comes the contestant and demurs to the plea and intervention filed on the part of Roy C. Lammers and the McGoldrick Lumber Co., and for grounds of demurrer allege, that the said plea and intervention does not state facts sufficient to constitute a defense against the entry in question.

2d: That the said plea and intervention is ambiguous and uncertain in this, that it does not appear therefrom whether matters therein alleged are with reference to acts committed and things done by the entryman prior to the issuance of the Receiver's final receipt.

3d: That the said plea and intervention is irrelevant and immaterial and particularly all of that portion thereof designated particularly 1, 2, 3, 4, 5, 6, 7 and 8, in this, that all of the matters and things therein alleged are matters, transactions and affairs which took place subsequent to and after the issuance of the Receiver's receipt.

By REGISTER.—Objection overruled. Exceptions.

IT IS HEREBY STIPULATED AND AGREED by and between all parties appearing that John Shannon on the 17th day of July, 1905, made homestead entry No. 4574 in the Coeur d'Alene, Idaho, Land Office for the S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ ; NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  and SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  Sec. 9, T. 44 N., Rge. 3 E., B. M. and a relinquishment of the same filed on the 26th day of Sept., 1906, at 2:45 o'clock P. M.; that on the 26th day of Sept. that the said John Shannon made timber and stone application for the same land and that final proof thereon was offered on the 16th day of Jan., 1907, and receiver's receipt of purchase, No. 2500, issued to him on that date; [28] that on the 21st day of Jan., 1907, John English filed a contest and protest against John Shannon, involving the land in question; that on the 26th day of Jan., 1907, a motion to dismiss the above protest was filed; that

on the 22d day of Jan., 1907, Fred Hamilton filed a contest and protest against said John Shannon, involving the same land in question and it was thereafter dismissed on motion of the protestant, Fred Hamilton.

Contestant at this time offers in evidence a certified copy of a contract between the entryman, John Shannon and William McCarter, the same being the one set up and described in the affidavit of protest, and ask to have the same marked Protestant's Exhibit "A."

By Mr. DUDLEY.—On behalf of Mr. Lammers and the McGoldrick Lumber Co., we object to this paper for the following reasons:

1st: That it is not shown that the John Shannon who signed this paper is the John Shannon who made the entry and who is the contestee named in this case, there being no evidence that Mr. Shannon ever gave or executed such a document as this, and Mr. Shannon being present and the parties being able to interrogate and find out whether he ever executed such a document before offering the paper in evidence.

2d: Upon the ground that the paper is irrelevant and immaterial in that it purports to be a contract to convey the lands described therein when the party of the first part makes final homestead proof of such lands and premises and receives his final Receiver's Receipt therefor, it appearing from the records in the land office and in evidence here, that the homestead entry made by John Shannon for this land was never consummated but was relinquished,



and that thereafter Mr. Shannon made a timber and stone entry of the land, which entry is the only entry in question in this case. [29]

By Mr. ELDER.—On behalf of the contestee, John Shannon, we object to the introduction of this contract:

1st: For the reason that the original instrument is the best evidence.

2d: For the reason that this is a certified copy of the records of an alleged instrument recorded in Shoshone County, Idaho, and is not a certified copy of the original instrument filed.

3d: That it is immaterial for said contract purports to have been made prior to the time when the protestee or contestee John Shannon, relinquished all of his rights in said land to the Government.

4th: That it is immaterial for the reason that said contract states that a certain interest was to be conveyed in said land when final homestead proof on said premises and a Receiver's final receipt therefor had been issued.

**[Testimony of Roy C. Lammers.]**

ROY C. LAMMERS, being called by Mr. McFarland, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. McFARLAND.)

Q. Mr. Lammers, at the time, or prior to the time you purchased this land, did you have an abstract of it?

A. No, sir, not at the time I purchased.

Q. When did you secure one?

A. Just about the date we purchased.

(Testimony of Roy C. Lammers.)

Q. You had an abstract before the consideration was paid?     A. Yes.

Q. Just the day before?

A. I think somewhere—maybe a day before.

Q. How long after you had contracted to purchase it before you got an abstract?     [30]

A. I think we had an abstract before we contracted to purchase.

Q. Referring to my first question—

A. I think, as I remember, we telephoned for the abstract at the time we were consummating the purchase, and had it sent in from Wallace.

Q. That was just prior to the time of making payments?     A. Yes.

Q. Isn't it a fact that sometime prior to consummating the purchase and making payments that you had certain affidavits made and filed for record and extended on the abstract?

A. Yes, just about the same time, we was about 2 days making the purchase, I guess.

Q. And you had those affidavits prepared and extended on the abstract before you—

A. I don't remember whether they were put on the abstract or not.

Q. Who examined the abstract?

A. Mr. Dudley.

Q. In your plea and intervention you have recited certain payments that you made for and on behalf of Shannon at the time the consideration was made?

A. Yes.

Q. Have you named all of them?

(Testimony of Roy C. Lammers.)

A. I believe so, to Shannon certain amounts, and other parties certain amounts for him, I believe they are all recited.

Q. Do you remember of withholding \$600.00 to pay to Wm. McCarter?     A. I do.

Q. That is not mentioned in your plea in intervention, is it?     [31]

A. I don't remember whether it is or not. I can find out by looking it over. It is contracted for in the intervention.

Q. Do you remember of writing a letter to R. E. McFarland on or about the 28th or 29th of April, last year, enclosing him an affidavit to have signed by Wm. McCarter?

By Mr. DUDLEY.—We object upon the ground that the correspondence referred to is in the nature of a compromise and that the letter itself is the best evidence.

A. I do.

By Mr. ELDER.—Objected to because it is not binding against this party.

By the REGISTER.—Objection overruled. Exception.

A. I don't know whether I wrote the letter or Mr. Dudley. I don't remember of writing it, but I remember of an affidavit being forwarded to Mr. McFarland on this transaction.

Q. Referring again to my former question, state whether or not you held out as a part of the consideration in the purchase of the Shannon claim and the land in question, \$600.00, which was to be paid

(Testimony of Roy C. Lammers.)

McCarter.      A. I did.

Q. At the time you consummated this deal you knew of this \$600.00 to be held out for McCarter?

A. I did in this way: Mr. Shannon told me he owed Mr. McCarter \$600.00 and he was desirous of paying it and I told him I would hold it out, and pay it.

Q. Would you know the affidavit which you sent to R. E. McFarland, if you was to see it?

A. I would know the McCarter affidavit, yes.

Q. Is that it?

A. I believe that is an exact copy: I believe I have an exact copy here I can compare it with. Yes, I believe that is an exact copy. [32]

Q. Are you acquainted with one Dan McLaren?

A. Yes.

Q. Where does he live at present?

A. I don't know; he is a woodsman.

Q. Where was he living on or about Feb. 14, 1907?

A. I think in Spokane; I am not sure, tho.

Q. You were a witness at that time to a certificate that he made, were you not, in Feb. 14, 1907?

A. Not that I remember of; perhaps if I saw the certificate I might recall it to my memory.

Q. I hand you the original certificate or affidavit and ask you if that is the one.

A. Yes, that is my own handwriting.

Q. I ask to have this marked Protestant's Exhibit "C" for identification.

Q. Have you in your possession the original affidavit made by John Shannon on the 25th day of April, 1907, and recorded in Shoshone County, Aug.



(Testimony of Roy C. Lammers.)

7, 1907? A. I have it in my possession.

Q. Have you any objection to its being made a part of the record in this case, you delivering it to the Register and Receiver as soon as possible?

By Mr. DUDLEY.—Here is the carbon copy with the exception of the signature.

Q. This copy which I hand you is a correct copy of that original affidavit, is it?

A. Excepting the signature, I believe it is.

Q. Were you present at the time that was executed? A. I was.

Q. Was it at your request that that affidavit was filed for record?

A. Yes, at the request of our attorney, Mr. Dudley, he had [33] it recorded, as I remember.

I ask to have that marked Contestant's Exhibit "D" for identification.

Q. Have you in your possession the original affidavit made by Jos. H. Johnson on the 25th day of April, 1907?

A. I believe I have a copy of it here, carbon copy, unsigned.

Q. Is this copy which I hand you a correct copy of the original? A. It is a carbon copy.

I ask to have that marked Contestant's Exhibit "E" for identification.

Q. Did you ever see the option which Dan McGregor gave Mr. Shannon for this land in question?

A. No, I did not, Dan McGregor told me he had an option from Jos. H. Johnson for that, I did not see it.

Q. Did he have it with him at the time he made this certificate?

(Testimony of Roy C. Lammers.)

A. He told me he had an option on the land and I took it for granted, I did not see it.

Q. Have you in your possession the original deed from John Shannon to Jos. Johnson?

A. No, I have not,—not that I know of.

Q. Have you in your possession the original deed from Jos. H. Johnson to yourself?     A. Yes.

Q. Have you in your possession the original deed of John Shannon to yourself?     A. Yes.

Q. Have you ever conveyed this land to the McGregor Lumber Co.?     A. I have not. [34]

Q. You are holding as trustee for the McGoldrick Lumber Co.?     A. Yes.

Q. And have been ever since you received the deeds?     A. Yes.

Q. Is that usual in your business transactions, between you and McGoldrick Lumber Co.?

A. Yes, I have a great number of lands in my name that belong to the McGoldrick Lumber Co. held by me as trustee.

Q. Is there anything in the deed from Johnson to you or Shannon to you that shows you are trustee for the McGoldrick Lumber Co.?     A. No, sir.

Q. Now, Mr. Lammers, you are still holding the \$600.00 which you offered to pay McCarter last April, are you not?     A. I am.

Q. In addition to that you are withholding \$1000.00 that belongs to Shannon on account of patent?     A. I am.

Q. Are you withholding any more than that?

A. That is all.

(Testimony of Roy C. Lammers.)

Q. Do you remember any other persons that you paid money to on account of Shannon, aside from those you have mentioned in your plea and intervention, including McCarter? A. Yes.

Q. Who?

A. I can give you a list. I gave Mr. John Shannon, personally, my check for \$350.00; I gave Mr. Jos. Johnson \$2,939.00; I gave Mr. Ralph T. Morgan \$900.00, and I deposited in the Exchange National Bank of Coeur d'Alene for Mr. Shannon, to his credit, \$1,757.00, and I gave Mr. William Dollar, the President of the Exchange National Bank, \$200.00 at Mr. Shannon's request, to take up a note that Mr. Shannon had endorsed as he told me. I gave Mr. [35] R. E. McFarland \$100.00 at Mr. Shannon's request; I gave Mr. Dan McLaren \$50.00 at Mr. Shannon's request; I paid Calhoun Hardware Co. \$24.00 at Mr. Shannon's request; I paid Windship & Henderson \$80.00 at Mr. Shannon's request, and I held back \$600.00, which Mr. Shannon told me to pay Wm. McCarter, as money that he owed him, and I held back \$1,000.00 on the purchase price, which will constitute the contract price of the land.

Q. Totalling \$8,000.00?

A. Yes, total \$8,000.00.

Cross-examination.

(By Mr. DUDLEY.)

Q. When did you first become acquainted with this land in question in this contest?

A. It was about the fall of 1906, somewhere along in Sept. or Oct.

(Testimony of Roy C. Lammers.)

Q. And when did you first have any talk or conversation with any person with reference to purchasing this land?

A. Not until I talked with McLaren, under his option from Johnson.

Q. When did you first talk with him with reference to the date of the option?

A. The same date that the option is dated, at the Halliday Hotel in Spokane.

Q. In your conversation, what, if anything, was said, as to who owned the land?

A. Not anything, I had seen it on the daily abstract sheets that Mr. Johnson was the present owner of the land by warranty deed and I knew he had the title to it.

Q. What, if anything, was done with reference to that option?

A. I don't understand your question.

Q. What, if anything, was done with reference to taking up [36] that option that you had obtained from Mr. McLaren?

A. I told him to have the proper warranty deeds and abstracts brought in so our attorney could look them over and pass on them and that I would accept the property under that agreement.

Q. Had you, prior to that time, had these lands cruised or examined?      A. Yes. .

Q. When?

A. In the fall of 1906, I had the whole basin examined.

Q. State under what circumstances.



(Testimony of Roy C. Lammers.)

A. I sent my cruisers off into that district and gave them the whole district to look over.

Q. Did Mr. McLaren furnish an abstract of this land?     A. No, sir.

Q. What was your next negotiation with reference to the purchase of this land, with whom and when?

A. Johnson and myself in your office, 'Johnson and Shannon and Mr. R. T. Morgan, just a minute; this McLaren option expired and Mr. R. T. Morgan drew up the option direct from Johnson to me, on or about the date of the expiration of this one, I believe covering a period of ten days.

Q. I call your attention to this paper and ask you whether or not that is the option from Johnson that you refer to.     A. It is.

Q. The original paper?     A. Yes.

We ask that this be marked Exhibit "1" for identification.

Q. Do you know by whom and where this option was drawn up?

A. In Mr. Morgan's office in this city.

Q. Where did you first see it?

A. When he drew it up.

Q. Who was present? [37]

A. Mr. Johnson, Mr. Morgan and myself, and I don't remember of anyone else.

Q. What was afterwards done with respect to this option of the purchase of this land?

A. Mr. Johnson gave us a warranty deed.

Q. State when, where and who was present.

A. Mr. Johnson came into your office with Mr.

(Testimony of Roy C. Lammers.)

Shannon, I think it was on the 26th day of April, and met me there and under your direction, I believe you drew the warranty deed from Mr. Johnson to myself, also a deed from Mr. Shannon to myself, covering the descriptions of this property.

Q. Where are those deeds at the present time?

A. I don't know just exactly their location, they are in the vault at the office or else in Washington, D. C.

Q. Have you made any search for them in the last few days?

A. Yes, I thought they were in the office but I did not find them.

Q. Coming to the time that these deeds were given, Mr. Lammers, I wish you would tell us, as well as you can recollect, just what occurred there.

A. Mr. Johnson and Mr. Shannon met me in your office to consummate this deal and the deeds were drawn up and properly signed and executed under your direction and, at Mr. Johnson's and Mr. Shannon's request, I paid over this money to the parties as they directed it paid, with my personal check, and held back under our agreement, \$1,000.00 until the patent to this land was issued.

Q. When did you first learn that Mr. Shannon had any interest in this land?

A. I saw that from the blue-print of the plat.

Q. After you saw the record of his transfer to Johnson?

A. Mr. Johnson made the statement in your office, to yourself and me, that as a matter of fact, his deed

(Testimony of Roy C. Lammers.)

from Shannon was [38] just given as security for the amount that Shannon owed him.

Q. Was Mr. Shannon present at the time?

A. Yes.

Q. Did he acquiesce in this statement?

A. Yes, he said that was what the deed was given for, Mr. Johnson said it practically constituted a mortgage and that the only reason Mr. Johnson had a deed for this property was to secure himself in the amount of money that Mr. Shannon owed him.

By Mr. McFARLAND.—I object to this line of testimony on the ground of hearsay, one of the parties being present and no reason shown why the other one should not be present to testify to facts.

By the REGISTER.—Objection overruled. Exception.

Q. I will ask you whether or not at that time and prior to your purchase of this land I required Mr. Johnson to furnish an affidavit as to those facts and whether or not the affidavit which is marked as Protestant's Exhibit "E" for identification, was then and there prepared and executed by Mr. Johnson.

A. Yes, it was.

Q. I will ask you whether or not, at or prior to that time, your attention had been called in the abstract of title to an instrument purporting to be a contract between John Shannon and Wm. McCarter, by which Shannon agreed, in consideration of, I think, \$1,000.00 to convey to McCarter the land in contest whenever he had proved up on his homestead entry.

(Testimony of Roy C. Lammers.)

A. Yes, you called my attention to that in the abstract.

Q. I will ask you what inquiry was then and there made by you of Mr. Shannon, with reference to that instrument.

A. As I remember, you asked Mr. Shannon if he had executed such an instrument.

Q. What did he say with reference to that?

A. He denied it.

Q. Now, I call your attention to a paper marked Contestant's [39] Exhibit "D" for identification and ask you whether or not that instrument was signed and sworn to by Mr. Shannon before you purchased this land.

A. It was. That is a carbon copy.

Q. Now, Mr. Lammers, what was the arrangement *Mr. Shannon with* reference to the purchase price of this land?

A. I agreed to pay him \$8,000.00 for the land and hold back \$1,000.00 until such time as the patent was issued, pay \$7,000.00 under his direction.

Q. I wish you would state—give a list of the names of the parties to whom he directed you to make payments and the amounts which you paid according to those directions.

A. I already done that in my testimony.

Q. For whom, if anyone, were you acting in these transactions? A. The McGoldrick Lumber Co.

Q. What was your relation at that time with the McGoldrick Lumber Co.?

A. To look after the buying of timber and their



(Testimony of Roy C. Lammers.)

outside interests generally.

Q. Are you an officer of the corporation?

A. No, sir.

Q. Is your father an officer of the corporation?

A. No, sir; I don't believe he is, he is a director.

Q. How long have you been in the service of that corporation?      A. About three years.

Q. How long has the corporation been organized?

A. That is about the time it was organized; I come out about a month after it was started.

Q. Who advanced the money that was paid upon this purchase price?      [40]

A. The McGoldrick Lumber Co., placed it to my credit in the bank at my request.

Q. I will ask you whether or not, prior to Feby. 14, 1907, the date of the option from McLaren, you or the McGoldrick Lumber Co., had any negotiations or made any dealings with Mr. Shannon, or with anyone, with respect to the purchase of this land?

A. We did not.

Q. I will ask you whether or not, prior to April 25th or 26th, at the time you made this purchase, you or the McGoldrick Lumber Co., or anyone for the McGoldrick Lumber Co., or anyone for you, directly or indirectly had paid or agreed to pay Mr. Shannon any money whatsoever for this land?

A. I did not.

Q. I will ask you whether or not, at or prior to the time Mr. Shannon entered this land on June 16, 1907, the McGoldrick Lumber Co., or you, or anyone acting for the McGoldrick Lumber Co., or you, had

(Testimony of Roy C. Lammers.)

any agreement, understanding or arrangement, directly or indirectly, with Mr. Shannon or with anyone acting or claiming to act for him, by which you were to purchase this land or any part thereof?

A. I never opened any negotiations for the purchase of this land until I took the matter up with Mr. McLaren.

Q. Had you ever, prior to the time Mr. Shannon entered this land, advanced any money or agreed to advance any money, or security or anything upon which Mr. Shannon could realize money to *enable* to enter this land?      A. No, I did not.

Q. And the same is true of the McGoldrick Lumber Co.?

A. Yes, the same is true of them. I was the only agent they had at the time.

Q. Now, Mr. Lammers, had you made any arrangement or agreement, directly or indirectly, or have any understanding of any [41] kind with anyone, at or prior to the time Mr. Shannon made entry of this land Jan. 16, 1907, or at or prior to the date of this option from McLaren, by which Mr. Shannon was to receive any money or anyone whatsoever was to receive any money from you or from the McGoldrick Lumber Co., for or on account of this land or for the timber on it?

A. I never opened negotiations for the purchase of this land until I took it up with McLaren.

Q. Will ask you whether or not, Mr. Lammers, you or the McGoldrick Lumber Co., or any officer or agent of the McGoldrick Lumber Co., to your knowl-

(Testimony of Roy C. Lammers.)

edge, had any notice or knowledge whatsoever at or prior to the time you purchased this land from Mr. Shannon, or at or until the initiation of this contest, that there was any claim by anyone that Mr. Shannon had not entered this land for his own use and his own benefit?

A. No, I don't believe there is anything of record.

Q. Aside from the question of record, did you have any notice from anybody that there was any claim, or that there was anything wrong with this entry?

A. No.

Redirect Examination.

(By Mr. McFARLAND.)

Q. Did you know when the contest of English was initiated?

A. I heard about it afterwards, I did not pay any attention to it, never went into it.

Q. That was prior to the filing of this affidavit, was it not, in this case?     A. I could not say.

Q. Did you hear anything about the other contest being initiated?     A. Yes, I did. [42]

Q. That was also prior to the filing of the affidavit in this case?

A. No, when I heard of that was at the time I got the option of Johnson at Mr. Morgan's office and he informed me of this and also had a release of it at the time I believe.

Q. After you had consummated the deal and received the deeds from Mr. Johnson and Mr. Shannon you paid out the amounts which was the consideration; is that true, did you?     A. I did.

(Testimony of Roy C. Lammers.)

Q. Take this letter, Mr. Lammers, and state whether or not this is a copy of the one which I called your attention to, the one which you sent to R. E. McFarland?

A. Yes, I believe it is, I would not say for sure; it sounds just as though I wrote it and I would say quite positively that it is.

I ask to have this marked Protestant's Exhibit "F" for identification.

Recross-examination.

(By Mr. DUDLEY.)

Q. I call your attention to this paper, Protestant's Exhibit "B" for identification, I meant to ask you, will you state under what circumstances that was prepared and sent?

A. You prepared this yourself and gave it to me and I told you I would mail it or see that Mr. McFarland got it, saying that I owed him \$600.00 at the time, and your instructions to me were to have it signed by McCarter and pay him the \$600.00 that I owed, under Shannon's request, and I mailed this to Mr. McFarland, apparently, who is Mr. McCarter's attorney, and informed him that upon its being properly signed that I would give him the \$600.00 which I was instructed to by Mr. Shannon.

Q. This letter which was just offered in evidence as Protestant's Exhibit "F" for identification is the letter you wrote? [43] A. Yes, it is.

Q. When, Mr. Lammers, with reference to the time that these lands were conveyed by Mr. Johnson and Mr. Shannon to you, was this letter and this affidavit



(Testimony of Roy C. Lammers.)

transmitted?     A. At the same time.

Redirect Examination.

By Mr. McFARLAND.—We ask to have this letter to Roy C. Lammers from S. L. McFarland marked Protestant's Exhibit "G" for identification.

Protestant now offers in evidence certified abstract of title to the land in question and ask to have the same marked Protestant's Exhibit "H" for identification.

By Mr. ELDER.—I desire to object to the introduction of that abstract as incompetent, irrelevant and immaterial and for the reason that there is no sufficient foundation.

By the REGISTER.—Objection sustained. Exception.

By Mr. DUDLEY.—I ask leave at this time, so as not to further delay proceedings, to procure and furnish as a part of the record in this case, one from Shannon to Johnson, one from Johnson to Lammers and one from Shannon to Lammers.

**[Testimony of Sam L. McFarland.]**

SAM L. McFARLAND, being sworn, testified as follows:

My name is Sam L. McFarland; residence, St. Maries, Idaho. On the 13th of this month I met John Shannon, the entryman in this case, for the first time in Joseph H. Johnson's place of business, in Coeur d'Alene, Idaho, and after telling him who I was he got to talking about the case with me.

By Mr. DUDLEY.—At this time, on behalf of the McGoldrick Lumber Co., and Mr. Lammers, I ob-

(Testimony of Sam L. McFarland.)

ject to this statement made by Mr. Shannon after the conveyance to Lammers and McGoldrick Lumber Co., as hearsay statement. [44]

By REGISTER.—We will hear Mr. McFarland's statement.

And he wanted to know what we expected to prove; I merely made the statement to him, "The affidavit of contest of course," he then made the remark, "Well, that contract that I signed with McCarter was before I relinquished my homestead and had nothing to do with my timber and stone."

By Mr. DUDLEY.—I move to strike out that statement so far as Lammers and the McGoldrick Lumber Co. is concerned, as being made prior to the time Mr. Shannon had conveyed his interest in this land to these parties and his statements made to third parties would not be any evidence against them, and it is hearsay so far as these parties are concerned.

By the REGISTER.—Motion denied.

By Mr. ELDER.—Objected to as immaterial.

By Mr. McFARLAND.—I renew the offer to offer in evidence a certified copy of contract between Shannon and McCarter.

By Mr. DUDLEY.—Objected to for the same reasons as objected to before, the identity of the person executing this contract, a certified copy of which is offered in evidence, with the John Shannon who made the homestead entry and the timber and stone entry, has not been shown, giving full weight to the testimony of Mr. McFarland, which by no means

(Testimony of John Shannon.)

follows that the contract referred to in the conversation between Mr. McFarland and Mr. Shannon is this paper which is now offered in evidence.

By the REGISTER.—Objection sustained.

**[Testimony of John Shannon.]**

JOHN SHANNON, being called by Mr. McFarland, testifies as follows:

Direct Examination.

(By Mr. McFARLAND.)

Q. State your name and place of residence.

A. John Shannon; live at Coeur d'Alene City at present.

Q. How long have you been a resident of the State of Idaho? [45] A. About 6 years.

Q. Where did you reside prior to making your proof on this entry?

A. At St. Maries, prior to the proof.

Q. Yes. A. Coeur d'Alene.

Q. After making final proof where did you go?

A. I was in Coeur d'Alene for quite a while and Spokane for a good while.

Q. Any other place? A. Yes.

Q. Where? A. Back in the State of Maine.

Q. How long have you been in Coeur d'Alene since your return here the last time?

A. I have been steady in Coeur d'Alene for about 30 days.

Q. Are you acquainted with Jos. H. Johnson?

A. Yes.

Q. How long have you known Mr. Johnson prior

(Testimony of John Shannon.)

to making your final proof?

A. Oh, probably a year or thereabouts.

Q. What has been the nature of your acquaintance with him?

A. Well, I stopped at his place and roomed there when I come to town.

Q. What business transaction, if any, did you have with him, aside from stopping at his place of business?

By Mr. ELDER.—Objected to as irrelevant and immaterial.

By the REGISTER.—Objection overruled.

A. I don't know as there was anything particular outside of that.

Q. In stopping at his hotel and in his other place of business, you were a customer of his, were you not? [46] A. Yes, as a rule.

Q. Was that the extent of all your business transactions that you had with Mr. Johnson during the year immediately preceding the time that you offered final proof on this land?

A. No, I borrowed some money once in a while.

Q. How much money did you borrow and how often?

A. I could not state right close; it was quite a little while ago. Probably \$10.00, \$20.00 or \$30.00 at one time.

Q. That was all, was it? A. Yes, thereabouts.

Q. State whether or not, or if so how and in what manner, you became indebted to Johnson in the sum of \$2,900.00 and some odd dollars, prior to the time



(Testimony of John Shannon.)

you made final proof and during the year you were acquainted with him.

By Mr. ELDER.—Objected to as irrelevant and immaterial.

By the REGISTER.—Objection overruled.

A. I borrowed it, room rent, etc.

Q. Do you mean to state that covering a period of one year, that on account of borrowing \$10.00, \$15.00 or \$20.00 at a time and on account of your room rent that you became indebted to Mr. Johnson in the sum of twenty-nine hundred and some odd dollars?

A. Yes, I think I did, and then later on—

Q. I am talking about preceding that—

A. I got some money from him along about the first of Feby.

Q. Now, on the date that you got your final receipt you gave Mr. Johnson a deed for this land, didn't you?

A. Not that I know of, not that I can remember of very well.

Q. Do you say that you did not?

A. Not that I can remember of; if I did it was not my natural signature.

Q. If you gave Mr. Johnson a deed for this land on the 16th day of Jany., 1906, the same day that you got your Receiver's [47] Receipt, then it was not your natural signature; is that right?

A. Yes, sir.

Q. Who did you ever deed this land to then?

A. I deeded it to Roy C. Lammers.

Q. Is that the only person you deeded it to?

(Testimony of John Shannon.)

A. That is the only person I ever knew of deeding it to; if I did I was not in shape to do business.

Q. Who was present at the time that you made this deed to Roy C. Lammers?

A. Mr. Lammers and Mr. Johnson and this gentleman here, I can't call him by name, and Judge Morgan and my brother, I think.

Q. Judge Morgan was representing you and Mr. Johnson, was he not?      A. Yes.

Q. You directed Mr. Lammers to pay Judge Morgan \$900.00, didn't you?      A. Yes.

Q. Was that for services rendered in this particular transaction?      A. Yes.

Q. Do you remember anybody else you told him to pay money to?      A. Yes.

Q. Who else?

A. A certain amount of money to the hardware store at St. Maries and a certain amount of money to Windship & Henderson, \$24.00, if I remember right, to the Hardware Company, and \$80.00 to Windship & Henderson and \$600.00 to William McCarter.

Q. Now, referring again to your acquaintance with Johnson during the year immediately preceding you making this final proof, in which you stated that you became indebted to him in this amount of money, I will ask you if he kept you in money during that time [48] when you needed it?

A. No, sir.

Q. You had money beyond that?      A. Yes.

Q. How did you happen to be borrowing then?

(Testimony of John Shannon.)

A. It was out on interest and I could not get it from the parties.

Q. Who were the parties that owed it to you?

A. My brother at Columbia Falls, Mont.

Q. Was that where you got the money when you made this final proof?

A. Yes, he forwarded me that money.

Q. Now, isn't it a fact, Mr. Shannon, that when you offered this final proof on this timber and stone entry that you testified before the local office here that you had money in the Kalispel Bank which you had had for 4 or 5 years and which you had earned in Montana, Idaho and Washington?

By Mr. ELDER.—Objected to for he cannot cross-examine his own witness.

By Mr. DUDLEY.—Objected to for the same reason and upon the further ground that where testimony has been reduced to writing and you cross-examine a witness with respect to his previous testimony that written testimony must be shown to him.

By the REGISTER.—Objection sustained.

Q. Prior to making this timber and stone entry you had a homestead on this same land?

By Mr. ELDER.—Objected to as immaterial. It is shown by the records in this office that he made a relinquishment to the Government of all his rights to this land.

Q. When you offered your testimony on behalf of your entry to the land in question, do you remember where you said you got the money for which you

(Testimony of John Shannon.)

paid for this claim?

A. I said Columbia Falls, Mont. I might have said Kalispel [49] in my final proof but I aimed to say Columbia Falls.

Q. You say you had loaned this money to your brother? A. Yes.

Q. How long had he had it?

A. 6 or 7 years, along about '95 to the present time, to the time I proved up, the 16th day of Jan., or about a month before that he returned it to me.

Q. Well, he had all this amount, didn't he?

A. Yes, more than that; he sent me \$500.00,—5 \$100.00 bills in a common letter.

Q. Registered letter? A. No, sir.

Q. And that money you say you earned where?

A. I made the most of it in Montana, some of it in Washington.

Q. Now, do you remember whether or not you received any money on account of your Receiver's Receipt, prior to the time you made this deed to Lammers? A. No, sir.

Q. You did not receive any at all?

A. No, sir. You say prior to the time I deeded this land to Mr. Lammers?

Q. Yes. A. Oh, yes, certainly I did.

Q. Who did you get that from, Johnson?

By Mr. ELDER.—I object to him leading his own witness.

Q. Who did you get it from?

A. Mr. Johnson the most of it, but from several people.



(Testimony of John Shannon.)

Q. I mean on account of this claim.

A. Oh, on account of this claim. [50]

Q. You don't remember of signing this deed on the 16th day of Jany. 1906? A. No, I don't.

By Mr. DUDLEY.—Do you recollect giving any mortgage or paper to Mr. Johnson right after you proved up on the 16th day of Jany.? A. No, sir.

Q. You have no recollection of that at all?

A. No, sir.

Q. Do you recollect making an affidavit Mr. Shannon at the time you gave this deed to Mr. Lammers? A. Yes.

Q. I call your attention to this paper, Contestant's Exhibit "D" for identification (reads): Is that the affidavit you made at the time? A. Yes.

Q. Now, in that affidavit you will notice that it says: That you are the grantor in that deed dated Jany. 16, 1907, does that refresh your memory, do you remember of making any conveyance to Johnson? A. I can't remember.

Q. You don't remember whether you did or not?

A. No, sir.

Q. At the time you made this affidavit you had those facts that you swore to fresh in your mind?

A. Yes.

Q. And the affidavit was true as you swore to it?

A. Yes.

Q. You say that you owed Mr. Johnson at the time Mr. Lammers bought that land something like \$2,900.00? A. Yes.

Q. And that debt had arisen partly out of money

(Testimony of John Shannon.)

that you owed him for room rent and money he loaned you? [51] A. Yes.

Q. During what time did your loans cover?

A. The most of them was loaned from along about the first of Feby. until about the date of the sale.

Q. Did Mr. Johnson have any agreement with you whatever, at the time you entered this land Jan. 16, by which you agreed when you entered it that you would convey that land to him? A. No, sir.

Q. Did you make any agreement of that kind with anyone whatever? A. No, sir.

Q. And the only person you recollect that you made any conveyance to was Mr. Lammers in April?

A. Yes, sir.

Q. Do you remember when you first met Mr. Lammers in that connection?

A. I could not state.

Q. Was it in Spokane about the time you made the deed? A. Just about that time.

Q. About the time you come to my office?

A. I met Mr. Lammers before that about a year or so but I did not know who he was.

Q. At that time there was nothing about this land or about buying or selling? A. No, sir.

Witness excused.

**[Testimony of Charles A. Kinsolving.]**

CHARLES A. KINSOLVING, being called by Mr. McFarland, after being duly sworn, testified as follows:

(Testimony of Charles A. Kinsolving.)

Direct Examination.

(By Mr. McFARLAND.)

Q. State your age and place of residence.

A. Past 30; reside in St. Maries, Idaho. [52]

Q. How long have you been a resident of Idaho?

A. About 15 months.

Q. Are you a native-born citizen of the U. S.?

A. I am.

Q. Have you ever used either your homestead or your timber and stone right? A. I have not.

Q. Are you acquainted with the land in question?

A. I am.

Q. State, as near as you can, the first time you remember of having seen the land.

A. Well, it was prior to the affidavit; I don't remember just exactly the date.

Q. Are you the protestant in this case?

A. I am.

Q. Are you acquainted with John Shannon?

A. I am.

Q. When did you first meet him?

A. I met him about 3 or 4 months ago as near as I can judge. He was introduced to me by Mr. Ross who runs a hotel at St. Maries.

Witness excused.

By Mr. McFARLAND.—We offer in evidence Contestant's Exhibit "D."

Same admitted.

We offer in evidence Protestant's Exhibit "E," marked for identification.

Same admitted.

(Testimony of Charles A. Kinsolving.)

We offer in evidence Protestant's Exhibit "F," marked for identification.

By Mr. ELDER.—Objected to as irrelevant and immaterial, and hearsay.

By Mr. DUDLEY.—Objected to as irrelevant and immaterial. [53]

By the REGISTER.—Objection sustained.

We offer in evidence Protestant's Exhibit "G," marked for identification.

By Mr. ELDER.—Objected to as incompetent, irrelevant and immaterial and hearsay.

By Mr. DUDLEY.—We object on the same grounds.

By the REGISTER.—Objection sustained.

We offer in evidence Protestant's Exhibit "B," marked for identification.

By Mr. DUDLEY.—Objected to as irrelevant and immaterial, it appearing from the testimony that that was sent months after this entry was made and subsequent to the time of the purchase of the lands by Mr. Lammers.

By Mr. ELDER.—Objected to as irrelevant, incompetent and immaterial and in no way binding upon the protestee or contestee in this action.

By the REGISTER.—Objection sustained.

We offer in evidence certified copy of final proof of Jno. Shannon taken at the final proof of the entry contested and ask to have it marked Contestant's Exhibit "H."

By Mr. DUDLEY.—Objected to as immaterial.

At this time the further hearing of this case was continued to 9 o'clock A. M., May 22d, 1908.



May 22, 1908, at 9 o'clock A. M.

**[Testimony of J. H. Johnson.]**

J. H. JOHNSON, being called by Mr. McFarland, testified as follows:

Direct Examination.

(By Mr. McFARLAND.)

Q. State your name, age and place of residence.

A. J. H. Johnson; 48; Coeur d'Alene, Idaho.

Q. How long have you resided in Coeur d'Alene?

A. 3 years. [54]

Q. What is your business Mr. Johnson?

A. Running hotel.

Q. How long have you known John Shannon, entryman in this case?      A. About 3 years.

Q. How long had you known him prior to Jany. 16, 1907?

A. I had known him ever since I had been here before that.

Q. About how long?

A. I would have to figure up a little bit.

Q. State the nature of that acquaintance with him? Prior to Jany. 16, 1907.

A. He was always a customer at my hotel, and saloon, etc.

Q. What, if any, business transactions did you have with him prior to Jan. 16, 1907?

A. Never any more than a customer.

Q. Are you the same Jos. H. Johnson to whom John Shannon gave a warranty deed from the land in question on the 16th day of Jany. 1907?

A. Yes.

(Testimony of J. H. Johnson.)

Q. Where was that deed made?

A. In Coeur d'Alene.

Q. Who was present?

A. There was Earl Sanders and Mr. Flynn, John Shannon and Pat Shannon and myself.

Q. You subsequently made an affidavit with reference to this warranty deed, didn't you?

A. I went through the whole business whatever there was attached to it.

Q. You subsequently made an affidavit with reference to this deed in the office of Cullen & Dudley at Spokane, Wash., who were attorneys for the McGoldrick Lumber Co., and Roy C. Lammers, didn't you? [55]

A. I acknowledged the deed, certainly.

Q. Do you remember the purport of that affidavit?

By Mr. DUDLEY.—I suggest that the affidavit be the best evidence.

Q. I hand you Protestant's Exhibit "E," which has been offered in evidence, and ask you if that is a copy of the affidavit which you made in Cullen & Dudley's office on the 25th day of April, 1907?

A. Yes, sir.

Q. In the affidavit you stated that this deed was given as a mortgage to secure certain money which Shannon owed you? A. Yes.

Q. How much did he owe you on the 16th day of Jany. 1907? A. I don't know exactly.

Q. Have you any way of ascertaining.

A. Not at the present time.

Q. How long would it take you to find out?

(Testimony of J. H. Johnson.)

A. Probably take me some time.

Q. Can you give me an estimate of how much he owed you on the 16th day of Jan., 1907?

A. No. It was fixed up after that, I don't know just what time or how much there was at that time.

Q. Did he owe you as much as \$500.00 on the 16th day of Jany., 1907?

A. I could not say, I don't know. I did not keep track that close.

Q. Would you say he owed you more than that?

A. He might of.

Q. Up to the 16th day of Jany., 1907, the only business transactions you had with Shannon was as a patron of your hotel and saloon? A. Yes.

Q. What he owed you up to that time was on account of his hotel bill and saloon bill, was it not?

[56] A. Yes.

Q. At the time that you took this deed, why did you not take a mortgage on the land instead of this land?

A. Because the lawyer made a deed out, that it was better that way.

Q. At whose request?

A. He stated that was the best way to do it and I told him to fix it up.

Q. Did you explain to your attorney at that time that Mr. Shannon was indebted to you something in the neighborhood of \$500.00?

A. I did not tell him anything about it. That was nothing to him; all he had to do was to secure me.

Q. Did you tell the attorney at that time that Mr.

(Testimony of J. H. Johnson.)

Shannon was indebted to you and that you wanted security for it?     A. Yes.

Q. What, if any, advice did he give you with reference to it?

A. Well, he said the best way was to just draw up a deed; he said it did not make any difference anyhow.

Q. Who was that attorney?     A. Earl Sanders.

Q. Did you tell Mr. Sanders at that time how much Mr. Shannon was indebted to you?

A. No, sir, it was none of his business I was just getting security.

Q. Did you make any memorandum of statement of account to Shannon at that time as to what his indebtedness was?     A. I think so.

Q. Who was present in the office, Mr. Johnson, at the time this deed was drawn up between you and Shannon?

A. Mr. Sanders and Mr. Flynn and John Shannon and Pat Shannon. [57]

Q. Do you remember about the time of the day that the deed was prepared?

A. Along in the evening.

Q. How long after he had made his final proof on the land?     A. Probably three or four hours.

Q. Who was present in Cullen & Dudley's office in Spokane, Wash., at the time that you made this affidavit, a copy of which has been offered in evidence?

A. Mr. Morgan, Mr. Lammers, Mr. Dudley and also Mr. Cullen and myself and Shannon.



(Testimony of J. H. Johnson.)

Q. State what took place there at that time.

A. The sale of the timber claim.

Q. From whom to whom?

A. John Shannon to Lammers.

Q. What part, if any, did you take in the transaction?     A. Simply turned it over.

Q. Do you know what instruments, if any, were passed at that time?     A. I cannot say.

Q. Did Mr. Shannon make and execute a deed at that time?     A. Yes.

Q. Prior to going to the office of Cullen & Dudley, in Spokane, do you remember of a conference or meeting between yourself, Judge Morgan, Shannon and Wm. McCarter, at the Halliday Hotel in Spokane?     A. No, sir.

Q. Were you ever present at any meeting in which the matter of the conveyance of this land was discussed, at the Halliday Hotel in Spokane?

Q. At the time of the meeting in Cullen & Dudley's office did you make and execute and deliver a warranty deed to Roy C. Lammers for the land in question?

A. If I remember right, it was transferred to Johnny and [58] then Johnny gave them the deed; they wanted it direct from him, if I remember rightly.

Q. At the time you secured this deed from Shannon in Sanders & Flynn's office in Coeur d'Alene, on the 16th day of Jan., 1907, did you give Mr. Shannon any instrument showing that you held title merely as a mortgagee?     A. No, sir.

(Testimony of J. H. Johnson.)

Q. Prior to Jany., and including Jany. 16, 1907, the law firm of Sanders & Flynn of Coeur d'Alene advised you in this matter, did they not?

A. I could not say as to that.

Q. State when, if at all, you first sought the advice of R. T. Morgan?      A. Not till after this came up.

Q. About when?      A. After the deed was issued.

Q. About when?

A. I don't remember. I am very poor to remember dates.

Q. In order to refresh your memory, Mr. Johnson, I will state that the deed from Shannon to you, according to the record, was executed on Jany. 16, 1907, and that on the 25th of April, 1907, Shannon conveyed the land to Roy C. Lammers, now having made this statement, can you give me an idea when you first sought the advice of R. T. Morgan regarding any matters about this transaction?

A. I could not give any date.

Q. Can you estimate how long after the 16th day of Jan. 1907?      A. I cannot say.

Q. Who employed R. T. Morgan?

A. Of course I employed him to see that I carried my end of it through and of course Johnny hired him also.

Q. Did you pay him for the services which he rendered to you personally? [59]

By Mr. ELDER.—Objected to as immaterial.

By Mr. DUDLEY.—I object on the same ground.

A. I paid him for all services he done for me.

Q. That was for any services which he rendered

(Testimony of J. H. Johnson.)

to you personally?     A. Yes.

Q. You paid him out of your own individual funds?     A. I paid him all services rendered me.

Q. Out of your own individual funds?

A. Certainly.

Q. When was the first time you had any conversation with Shannon, prior to Jany. 16, 1907, with reference to securing you your money which he owed you?

By Mr. DUDLEY.—Objected to as assuming a fact which there is no evidence of, that there had been any conversation.

Question changes.

Q. How long, if at all?     A. Never at all.

Q. How long, if at all, prior to the time of the issuance of Receiver's final receipt to him, did you have any conversation with Shannon regarding the securing you for the money which he owed you?

A. Nothing said in regard to security.

Q. When did you have the first conversation with him regarding security for the money he owed you?

A. When I got the security.

Q. Was that about three hours afterwards, as you have testified to?     A. Three or four, maybe five.

Q. Now, Mr. Johnson, at the time you had this conference in Cullen & Dudley's office in Spokane, Wash., at which time Shannon conveyed the land in question to Roy C. Lammers, did you make any statement to Shannon as to his indebtedness to you?

A. No, sir. [60]

Q. Do you remember the amount that was paid

(Testimony of J. H. Johnson.)

you at that time by Roy C. Lammers?

A. I think I do.

Q. How much?

By Mr. ELDER.—Objected to as immaterial.

By the REGISTER.—Objection overruled.

A. Oh, it might have been \$500.00 and it might have been \$1,000.00.

Q. Not over \$1,000.00?      A. It might have been.

Q. Will you say it was not over \$1,000.00?

A. It was about that I guess.

Cross-examination.

By Mr. DUDLEY.—(Hands witness check-book.)

Q. Was not the check that Mr. Lammers gave you on that date Mr. Johnson, \$2,939.00?

A. Yes, that is right but I did not think it was that much.

Q. Mr. Johnson, Mr. Shannon had been doing business with you in connection with your bar for a year or two prior to Jan. 1906?      A. Yes.

Q. And he was a pretty heavy drinker?

A. Yes.

Q. Isn't it a fact that when he would run short of money he would borrow from you \$10.00 or \$15.00 or \$20.00 from time to time?      A. Yes.

Q. And that continued until the time that you settled your accounts when Mr. Lammers bought the land?      A. Yes.

Q. And the amount which he was owing you at this time was agreed between you and Shannon to be \$2,939.00? The amount Mr. Lammers gave you?

A. Yes. [61]



(Testimony of J. H. Johnson.)

Q. Now, at the time you and Mr. Morgan and Mr. Shannon and Mr. Lammers and Mr. Shannon were at the office of Cullen & Dudley, at the time that you closed up this transaction— A. Yes.

Q. Now, at that time you informed us that this deed which you had obtained from Mr. Shannon was a mortgage to secure the payment of the money he owed you? A. Yes.

Q. But isn't it a fact that on that date, Mr. Johnson, that I told you that that left the title standing in your name and instead of taking a release of mortgage from you, to make a perfect title, we would want a deed from you? A. Yes.

Q. And I also at that time told you that I would want this affidavit that you made for the purpose of clearing the record? A. Yes.

Q. And I drew the affidavit and you executed it? A. Yes.

Q. Now, I call your attention to the sheet in this abstract of title showing the deed from Johnson to Roy C. Lammers, and I ask you to examine that and state whether or not, if that refreshes your memory, as to whether or not you gave Mr. Lammers the deed on that occasion? A. He took a deed from both.

Q. Mr. Johnson, did you give Mr. Shannon any money for the purpose of enabling him to enter this land at the time he made the entry?

A. No, sir, not that I know of.

Q. Had you, prior to the time he made his entry, had any arrangement or agreement or understanding with him, directly or indirectly, by which he was to

(Testimony of J. H. Johnson.)

convey the land to you, after he made his entry?

A. No, sir. [62]

Redirect Examination.

(By Mr. McFARLAND.)

Q. Do you keep a book account Mr. Johnson of your business transactions? A. No.

Q. Any transactions involving as much as \$2,900.00, do you keep any book account of?

A. That is given by orders.

Q. Do you keep any book account of these orders?

A. No, sir; simply hand them back when I secure it.

Q. Covering a period during which Shannon contracted the indebtedness to you on account of hotel and bar bill and money borrowed of you, did you keep any account of that?

A. Just took his I. O. U., and when he settled he got his I. O. U.'s.

Q. Did you, every time he stayed all night at your house, take his I. O. U. or every time he bought drinks take his I. O. U.?

A. If he run a bill to \$50.00 or \$100.00 I would take his I. O. U. for it.

Q. Well, whenever he would stop at your hotel or buy at your bar did you take his I. O. U. for it before it reaches that amount?

A. He generally got the cash and paid for it.

Q. Have you kept any book account or have you any statement showing any business transactions between you and the Shannon up to the 25th day of April, 1907?

(Testimony of J. H. Johnson.)

A. Nothing any more than notes, notes that he has issued.

Q. You have no record of those notes?

A. The notes show for themselves.

Q. You have no record of those notes?      A. No.

Q. What is the largest note that you know of his having [63] issued to you?

A. I don't remember now.

Q. I understand you to say that you paid R. T. Morgan for all business that he transacted for you individually?

A. I paid him for all services that he rendered to me.

Q. Out of your own individual funds?

A. I suppose it was my funds.

Q. At whose instance and request did Judge Morgan go to Cullen & Dudley's office in Spokane?

A. Johnny Shannon, he was the man he was doing business for.

Witness excused.

**[Testimony of John Shannon (Recalled).]**

JOHN SHANNON, recalled by Mr. McFarland, after being duly sworn, testified as follows:

(By Mr. McFARLAND.)

Q. Mr. Shannon, are you acquainted with Mr. Caple, the Special Government Agent?

A. I don't believe I am,—not that I know of.

Q. Do you remember of meeting Mr. Caple, the Special Government Agent, at or near St. Maries, Idaho, during the month of July or August last year?

A. I believe I did; I don't know whether he was

(Testimony of John Shannon.)

the man you are speaking about; I don't know his name or anything about him,—he may have been a horse thief, for all I know.

Q. Where was that, at Cox's camp on the St. Maries River?     A. It was at the Maries.

Q. Do you remember of having made a written statement to him at that time?

A. Yes, to a certain man, if it is the same man, I don't know him from anybody else, but I made a statement to him—what kind of a looking man, this man you are speaking about?

Q. A tall dark complected man?

A. Yes, that is the fellow.

Q. You signed a statement before him at that time, did you? [64]

A. Yes, I did not read it over very thoroughly and did not know how much was in it, but I stated at that time to the best of my knowledge, he and his man that was with him, almost made me say that I received money from Roy C. Lammers to prove up on that claim with, and if I would not say that they would take me and lock me up. I made a statement there that I sold to Roy C. Lammers for the amount of \$8,000.00 and for him to pay, what I owed up river to any person in that country, and I can't just remember the numbers but it was certain amounts—I think \$24.00 to the Hardware Co., at St. Maries and somewhere about \$80.00 to Windship & Henderson and \$600.00 to Wm. McCarter.

Q. Did you, at that time, say to him and sign a statement that you had made this contract with Wm.



(Testimony of John Shannon.)

McCarter at the time that your homestead entry was in effect, but that after you relinquished the homestead entry that you got the money from Johnson to prove up on?

A. No, sir, I never made no such remark in my life,—no man can prove it in the State of Idaho.

Q. Did you tell him that Johnson got the biggest part of your money from your claim and that all you got out of it was enough to make a trip back to the State of Maine?

By Mr. DUDLEY.—I object to that as leading and they are apparently laying a foundation for impeachment.

By the REGISTER.—Objection sustained.

Q. Now, go on, Mr. Shannon, and state just as near as you remember what you did state to Mr. Caple or the gentleman to whom I call your attention.

By Mr. ELDER.—Objected to as irrelevant and immaterial and the instrument is the best evidence of the statement.

By Mr. DUDLEY.—On behalf of McGoldrick Lumber Co., and Mr. Lammers, statements made by Mr. Shannon after the conveying to them, would not be binding upon them or competent or relevant testimony. [65]

By the REGISTER.—Objection overruled. Exception.

By Mr. ELDER.—Objected to as immaterial. The protestant's own witness has testified that there was no contract between those parties before the time of this entry.

(Testimony of John Shannon.)

By the REGISTER.—Objection overruled.

A. I don't know at that time; it has been so long I have forgotten.

Q. Do you remember anything you said to him at that time?     A. Said to who.

Q. To Mr. Caple, this man that you saw near St. Maries?

A. Yes, I remember quite a lot I said to him. I said a number of things about the transactions, how I sold my claim and what I did with it, and I stated to him the amount of money I paid to everyone, or give authority to Mr. Lammers to pay these parties.

Q. Do you remember the name of the man who was with Mr. Caple at that time?

A. His name is—I can't remember now, I have known him 2 or 3 years.

Q. Was it S. M. Babbitt?

A. That is the man, sir.

Q. Mr. Shannon, when did you first employ R. T. Morgan to represent you in the conveyance of this land from yourself to Roy C. Lammers?

A. I cannot remember the date at all.

Q. Was it between the time that you proved up and the time that you sold?

A. It would be along thereabouts.

Q. Do you remember how many visits you made to Spokane in connection with this transaction?

A. I do not.

Q. Do you remember whether you made more than one or not?

A. Yes, I made several trips to Spokane during

(Testimony of John Shannon.)

the 35 or 40 [66] days. I guess probably once or twice a week, I cannot swear positively, may have been 50, may have been 30, may have been 10.

Q. Did Judge Morgan accompany you on each trip? A. No, sir, never.

Q. What was the nature of his employment?

A. The nature of his employment between me and him was to see about those rascals that were trying to steal my claim away from me.

Q. Did you have in mind any rascals at that time?

A. Yes, I did.

Q. You don't remember the first that you consulted him about the matter, do you?

A. Not just exactly.

Q. Did you know that he was in the personal employment of Mr. Johnson? A. No, sir.

Q. When you gave this order to Mr. Lammers to pay R. T. Morgan \$900.00, which was for services rendered to you personally, was it? A. Yes.

Q. Did you know at that time that he was in the employment of Mr. Johnson? A. Yes.

Q. When did you first find out?

A. Along about the time that I paid him.

Q. That is the first time you found it out?

A. Yes.

Q. Was that after the land had been conveyed, after you signed the deed?

By Mr. DUDLEY.—Objected to as immaterial.

By the REGISTER.—Objection overruled.

A. I ain't positive; I think it was. [67]

Q. Mr. Shannon, do you remember of ever having

(Testimony of John Shannon.)

talked with Mr. McCarter in the Halliday Hotel in Spokane regarding the transaction of your selling the land to Mr. Lammers?

A. No, sir, I never did.

Q. Did you ever have any conversation with him in Spokane at any time regarding the matter?

A. No, sir, I never did.

Q. Are you acquainted with C. C. Fuller?

A. No, sir, I don't know him at all.

Q. Now, in order to refresh your memory, I will state that C. C. Fuller is in the employ of the Monarch Lumber Co., residing at Remington, Idaho, on the St. Joe River.

A. What kind of a looking man is he?

Q. Large, heavy set.

A. No, sir, I don't know him.

Q. Prior to going into Cullen & Dudley's office in Spokane, on the 25th day of April, 1907, where, if at all, did you talk this matter over?

A. No place at all; just took the car from the city of Coeur d'Alene and went to the city of Spokane and went right into the office and done business,—did not talk to anybody at all.

Q. Who negotiated the sale for you?

A. In what way?

Q. Between you and Mr. Lammers.

A. Mr. McLaren, I guess, made the sale.

Witness excused.



**[Testimony of Joseph Johnson (Recalled).]**

JOSEPH JOHNSON, recalled by Mr. McFarland, testified as follows:

(By Mr. McFARLAND.)

Q. Mr. Johnson, prior to April 25, 1907, did you give R. C. Lammers an option on this land in question?

A. No, sir,—yes, I did too,—no, I think I gave it to McLaren. [68]

Q. Was that a written option? A. Yes.

Q. Did you negotiate the sale of this land with Mr. Lammers? A. No, sir.

Q. Who first approached Mr. Lammers with reference to selling the claim, if you know?

A. I cannot tell you as to that.

Q. Who first approached you with reference to giving an option, if you know? A. Mr. McLaren.

Q. And did you give McLaren at that time a written option? A. Yes.

Q. Did you give anyone else a written option?

A. No, sir.

**Cross-examination.**

By Mr. DUDLEY.—I hand you Claimant's Exhibit 1 for identification; look at that and see if that refreshes your recollection any concerning the transaction?

A. Yes, that is all right, that was long before McLaren, wasn't it?

Q. I hand you Protestant's Exhibit "C" for identification and ask you to examine that.

A. This is what they took from me to Lammers.

(Testimony of Joseph Johnson.)

Q. I will ask you if, prior to Feb. 14th, 1907, you had given a power of attorney or option to Dan McLaren.     A. Yes.

Q. And after that had expired did you give this option April 17, to Roy C. Lammers, direct?

A. Yes, I must have given it to him; that is my signature all right, but I have forgotten what time it was I gave it to him.     [69]

Q. Look at the date; was it about that date?

A. I cannot say as to the date; that is my signature there.

Q. Had Mr. Shannon told you to find a buyer for this land?

A. Yes, it was through his request that I give that that way; he requested it.

Q. And it was under this option of April 17, that the deal was finally closed, on April 25th?

A. Yes, sir.

Redirect Examination.

(By Mr. McFARLAND.)

Q. After having taken a warranty deed from Shannon to yourself to secure a claim in the neighborhood of \$500.00 as you have testified to, and considering the deed a mortgage, as you stated in your affidavit, which is a part of the record in this case, you then gave an option to McLaren and afterwards an option to Roy C. Lammers, is that correct?

A. Yes.

Witness excused.

**[Testimony of R. C. Lammers (Recalled).]**

R. C. LAMMERS, being called by Mr. McFarland, testified as follows:

Direct Examination.

(By Mr. McFARLAND.)

Q. Mr. Lammers, have you the cancelled check for \$2,939.00, which you delivered to Mr. Johnson on the 25th day of April, 1907?

A. I believe I have it in Spokane.

Q. Can you produce it?      A. I think so.

Q. Will you, and make it a part of the record?

A. I will if it is possible to find it.

**[Testimony of Jacob Johnson (Recalled).]**

JACOB JOHNSON, recalled by Mr. Dudley, testified as follows:

(By Mr. DUDLEY.)      [70]

Q. Mr. Johnson, I believe you stated that Mr. Shannon used liquor, and has since you have known him, very excessively?      A. Yes, sir.

Q. I will ask you whether or not that his excessive use of liquor has impaired his memory and mental faculties?      A. I think so; yes.

Witness excused.

**[Testimony of R. T. Morgan.]**

R. T. MORGAN, being called by Mr. McFarland, after being duly sworn, testified as follows:

Direct Examination.

(By Mr. McFARLAND.)

Q. State your name, residence and occupation.

A. R. T. Morgan; Coeur d'Alene, Idaho; attorney at law.

(Testimony of R. T. Morgan.)

Q. Are you acquainted with Jos. H. Johnson?

A. I am.

Q. How long have you known him?

A. I think I first met him during Jany., 1907; as to the date I can't say.

Q. Between the first day of Jany., 1907, and the 25th day of April, 1907, were you acting in the capacity of his attorney?     A. I think so.

Q. State whether or not, as attorney, you advised him with reference to the conveyance or any other transactions in connection with a deed from himself to Roy C. Lammers for the land in question from Jany. 1st, 1907, to and including April 26, 1907?

A. If I recollect right, I think there was nothing said or no advice given in reference to the deed by Johnson to Lammers—at least I don't remember anything of that character at this time.

Q. Did he consult you regarding any transaction in connection with the Shannon timber and stone entry between those dates?

A. I think so, yes. I would like to say in explanation of question relative to my acting as attorney for Mr. Johnson—I acted also for Mr. Shannon at that time. [71]

Q. Did you have a consultation with Mr. Johnson and some other parties in the Halliday Hotel in Spokane between the 15th day of April, 1907, and the 25th day of April, 1907, with reference to the Shannon claim?

By Mr. DUDLEY.—Objected to as immaterial; it relates to a transaction which was long subsequent



(Testimony of R. T. Morgan.)

to the entry which is attached.

By the REGISTER.—Objection overruled.

A. I cannot remember now; there were so many conversations and consultations in reference to this claim of Shannon's.

Q. Did you ever have any consultation regarding this particular claim at the Halliday Hotel in Spokane prior to the 25th day of April, 1907?

A. I can't remember of any conversation or consultation.

Q. Are you acquainted with C. C. Fuller?

A. I am.

Q. Are you acquainted with Wm. McCarter?

A. I am.

Q. Did you, prior to April 25, ever have any consultation, at which time those two parties were present, with Mr. Johnson, regarding the Shannon claim?

A. No consultation, no; there might have been a discussion or consultation in which the Shannon claim was discussed.

Q. At the Halliday Hotel in Spokane?

A. It might have been at the Halliday; I think they were there one day when we were there.

Q. Was Mr. Johnson there at that time?

A. I don't remember.

Q. When did you commence your employment with Mr. Shannon, as attorney for him?

A. Well, it was about—a few days before the motion to dismiss the contest then pending between John English and John Shannon in this office; it was along in Jany. sometime, if my recollection serves me

(Testimony of R. T. Morgan.)

correctly, of 1907. [72]

Q. Was it subsequent or prior to the time of the issuance of the receiver's final receipt?

A. Subsequent, I never had anything to do with Mr. Johnson, Mr. Shannon or anyone connected with this matter and knew nothing of it until the final receipt was brought to me.

Q. At the time that you were representing Mr. Shannon in this matter, as you have testified to, were you also in the employment of Mr. Johnson?

A. I don't know that their joint interests were ever discussed; it was understood that myself and Mr. Crane represented the interests which were attacked at that time by John English and someone else; I have forgotten who it was.

Q. Were you and Mr. Crane representing Johnson & Shannon together?

A. Well, we represented those interests, whatever they were; Mr. Johnson was the first man that came to me in regard to the matter.

Q. When you speak of interest, what interest do you have reference to?

A. The interests involved in that contest, whatever they were, I don't remember now; the papers will show.

Q. Now, repeating my question again, during that period were you employed by both Mr. Shannon and Mr. Johnson together?

A. I was employed by Mr. Johnson who had a deed to this property.

Q. How long did you continue in his employ?

(Testimony of R. T. Morgan.)

A. Until the matter was finally disposed of in the land department and until the transfer of his interest to either Mr. Lammers or McGoldrick Lumber Co.

Q. Did Mr. Johnson pay you personally for those services?

By Mr. DUDLEY.—Objected to as immaterial.

By the REGISTER.—Objection overruled.

A. In part he paid me in cash and the balance of the fee [73] came at the time of the sale to Mr. Lammers.

Q. What part did Mr. Johnson pay you in connection with this Shannon entry?

By Mr. ELDER.—Objected to as immaterial.

By the REGISTER.—Objection overruled.

A. Well, I looked to him for all the fee because the employment was made by him and I would consider that the fee came from Mr. Johnson.

Q. Now, a moment ago you stated that a portion of the fee was paid in cash by Mr. Johnson and the balance came at the time of the transfer; was that portion which Mr. Johnson paid in cash paid on account of employment between you and himself?

A. That was paid on account of employment to defend this contest.

Q. Well, now, with reference to my question again—

A. What I referred to in my former answer was—at the time I was employed I received a retainer which Mr. Johnson paid in cash.

Q. Did Mr. Johnson afterwards on his own personal account, pay you any further sum for your services to him?

(Testimony of R. T. Morgan.)

A. Well, the balance of the fee came by check issued by Mr. Lammers at the time the settlement was made with him.

Q. When did you first commence your employment with Shannon?

A. Whenever that contest was filed, I will state that there was no definite agreement or any conversation prior to the filing of the papers on the part of the contestee, between myself and Mr. Shannon.

Q. What was the amount of the check which was given you on the 25th of April and by whom and on whose account?

A. I don't know that it was given on the 25th of April; if that is the date *then* the money was paid over, I received a check for \$900.00. [74]

Q. On whose account?

A. I don't remember who gave it to me; I think it was Mr. Lammers' check and on account of my services in this contest.

Q. At whose instance was the check given?

A. Johnson's.

Q. Were you present in Cullen & Dudley's office in Spokane, Wash., on the 25th day of April, 1907, the time the deed was exchanged between Johnson and Lammers for the land in question?

A. I think *it* was.

Q. At the time state who told Mr. Lammers to give you the check for \$900.00?

A. Well, I could not say; it was understood, and Mr. Lammers had been previously informed of the arrangements regarding my employment and I think



(Testimony of R. T. Morgan.)

had knowledge that that amount was to go to me.

Q. Do you mean to state that Mr. Lammers, without being told by anyone there at that time, gave you a check for \$900.00?

A. There must have been some previous arrangement.

Q. Do you remember what that previous arrangement was and where made?

A. I don't know where it was made but it was a matter that I think was understood between myself, Mr. Johnson and Mr. Lammers, that I should receive that fee in case of the successful termination of this contest, and Mr. Lammers was informed of that fact and paid me the money or gave me the check.

Q. You represented Johnson and incidentally Shannon in the contest between English and Shannon?

A. I necessarily had to represent Mr. Shannon because he was the contestee.

Q. That contest was dismissed on motion of English or his attorney, was it not?

A. It was not; it was ordered dismissed by the Commissioner of the General Land Office. [75]

Q. Did you also represent Shannon in a subsequent contest? A. Subsequent contest?

Q. Yes. A. What contest was that?

Q. In the case of Hamilton.

A. In the same way that I represented him in the other contest.

Q. Was that contest dismissed on motion of Hamilton, or his attorney?

(Testimony of R. T. Morgan.)

A. I don't remember; the papers are here on file to show for themselves.

Q. Have you any recollection about it?

A. There was a paper filed by Hamilton, I think, dismissing that contest or ordering it dismissed.

Q. Now, Judge Morgan, with reference to the English contest, was that contest dismissed by the commissioner prior to April 25, the date on which Johnson conveyed this land?

By Mr. DUDLEY.—I object to that as the record is the best evidence.

By the REGISTER.—Objection sustained.

Q. Do you know what amount was paid to either Mr. English or Mr. Hamilton on account of their contest?

By Mr. DUDLEY.—Objected to as irrelevant and immaterial, and assuming that some money was paid.

Question withdrawn.

Witness makes statement.

So far as my knowledge goes, there was nothing at any time—never one dollar paid to anyone in consideration of dismissing any contest or for any consideration with reference to the litigation of this Shannon claim.

Q. Now, going back again to your employment with Mr. Johnson, at the time of the conveyance from Johnson to Mr. Lammers, do [76] you know anything regarding the accounts or indebtedness between Johnson and Shannon?

A. Nothing any more than Mr. Shannon owed Mr. Johnson some money but what it was for or on what

(Testimony of R. T. Morgan.)

account I don't know.

Q. You don't know anything about the amount?

A. I do not.

Witness excused.

**[Testimony of Earl Sanders.]**

EARL SANDERS, being called by Mr. McFarland, after being duly sworn, testified as follows:

**Direct Examination.**

(By Mr. McFARLAND.)

Q. State your name, residence and occupation.

A. Earl Sanders; Coeur d'Alene, Idaho; attorney at law.

Q. Mr. Sanders, from the abstract which I hand you, I notice a deed from John Shannon to Joseph H. Johnson dated Jan. 10, 1907, and acknowledged before you as notary public; do you remember the time and circumstances of the execution and acknowledgment of that deed?

A. I remember that Mr. Johnson and Mr. Shannon came up to my office and that Mr. Shannon executed a deed to Mr. Johnson for certain property and that I took the acknowledgment of that deed, as to the exact time I could not say, but it was something over a year ago, I think.

Q. Do you know at whose suggestion the conveyance was made in the form of a warranty deed?

By Mr. ELDER.—Objected to as immaterial.

By Mr. DUDLEY.—Objected to, for if the witness was acting as an attorney for the parties of course whatever communications he received as an attorney would not be competent or proper.

(Testimony of Earl Sanders.)

By the REGISTER.———

A. I don't remember who brought up the matter, which one it was that told me to make the deed. [77]

Q. Was it one of the two?

A. My recollection is that they were the only two there.

Q. Did either Johnson or Shannon at that time seek your advice as an attorney regarding any other transactions in connection with the conveyance of this land?

By Mr. DUDLEY.—Objected to as incompetent, irrelevant and immaterial.

By Mr. ELDER.—Same objection.

By the REGISTER.—Objection overruled.

A. I think they did seek my advice with reference to some matters with reference to this land.

Q. After going into the matter was anything said with reference to a mortgage instead of a deed?

By Mr. ELDER.—Objected to as immaterial and irrelevant.

By the REGISTER.—Objection overruled.

A. I don't recollect that there was anything said; I don't remember it now.

Witness excused.

Protestee at this time moves the Honorable Register and Receiver that this protest or contest be dismissed for the reason that there has been no evidence whatever introduced that would in any way affect the entry made by John Shannon on this land. For the further reason that the evidence of the protestant clearly shows that John Shannon acted at all times



(Testimony of Earl Sanders.)

within his rights and that he had made no contract or no agreement to convey any part or any interest in this land, and it also shows that he did not convey any interest in this land by reason of any prior contract or agreement.

By Mr. DUDLEY.—We join in the motion for the reason that the evidence is insufficient to justify or support any findings of fraud on the part of Mr. Shannon to support or justify the cancellation of the entry.

By the REGISTER.—Before acting upon the motion I desire to [78] examine the transcript of the testimony.

By Mr. DUDLEY.—We offer in evidence the option of Dan McLaren of Feby. 14, 1907, which was marked for identification Protestant's Exhibit "C." We offer in evidence option of April 17, 1907, given by J. H. Johnson which was heretofore marked Claimant's Exhibit "I" for identification, and ask to have it marked Exhibit "B."

We ask to supply this office and have admitted in evidence the certified copies of the three deeds from Shannon to Johnson, from Johnson to Lammers and from Shannon to Lammers; we will have to order these certified copies from the Register and ask to have them forwarded to the land office direct.

We offer in evidence, provided we can find them, canceled checks from Lammers to Johnson, and Lammers to Morgan.

**[Testimony of F. M. Dudley.]**

F. M. DUDLEY, being duly sworn, testifies as follows:

I have been throughout this entire transaction, the attorney for McGoldrick Lumber Co. and Mr. Lammers. Mr. Lammers brought the matter of this purchase, as I remember it, into our office in April, 1907, for the purpose of having our firm examine the condition of the title to the land entered by Mr. Shannon prior to completing the contemplated purchase of the land. For that purpose my partner, Mr. W. E. Cullen, Jr., came to Coeur d'Alene to examine the records in the Land Office, after his return, from information given me, probably by Mr. Cullen, I learned of the existence of the English contest and also the Hamilton contest and was also advised at that time of the dismissal of both of these contests. I examined the abstract of title to this land and my attention was called to a record purporting to be a record of a contract between John Shannon and Wm. McCarter, by which Shannon was to convey to McCarter an undivided one-half interest in the lands which are the subject of this contest. The date of that and the facts referring to it are the same as shown in this abstract of title which has been introduced in evidence, altho the abstract I had [79] before me was a different abstract from this one.

Judge Morgan was in the office, as I recollect it, on 2 or 3 occasions concerning the title before we closed the transactions and I questioned him with

(Testimony of F. M. Dudley.)

reference to the title. I think it possible that he is the gentleman who gave me the information. I think he had with him the original dismissal of the Hamilton contest. I won't be positive whether it has been filed or not. The time the transaction was closed up, on April 25, Judge Morgan, Mr. Johnson, Mr. Shannon, Mr. Lammers, Mr. Cullen and myself were present at the office and at that time I learned, I think for the first time, possibly Mr. Johnson had advised me of it before, that the apparent deed to him had been given him to secure moneys which he said that Mr. Shannon owed him. I then told the parties that, under those circumstances, the instrument was a mortgage and I would require for Mr. Lammers a deed from Mr. Shannon in addition to the deed from Mr. Johnson. Mr. Morgan concurred in the view I took of the legal aspect and the deeds were drawn up in the office. I think I drew them myself. At that time I questioned Mr. Shannon closely with reference to this contract with McCarter which the abstract showed. Mr. Shannon assured me that that was not his contract, that he had never signed or executed such a contract and that if there were such a contract it was a forgery. I told the gentlemen that I would not O. K. the title for Mr. Lammers without an affidavit setting forth the statements which Mr. Shannon had made to me with respect to that matter and I also insisted, for the purpose of clearing up the record with Mr. Johnson's statement that the deed to him was to secure moneys loaned, was to be set forth in the shape of

(Testimony of F. M. Dudley.)

an affidavit, which affidavit would be placed of record and become a part of the chain of title. At that time it was stated by Judge Morgan, I think, or Mr. Lammers, in the presence of Mr. Shannon and Mr. Johnson, that the payments would be made in the shape of sums to be paid to the various creditors of Mr. Shannon [80] and the balance to be paid to Mr. Shannon, with the exception of \$1,000.00, which should be retained by Mr. Lammers until such time as the patent might issue. I think that some of the checks were drawn there at that time; I think Mr. Lammers there at that time gave Mr. Johnson a check for \$2,900.00 and some odd dollars and I think a check was also at that time given Judge Morgan for \$900.00; I will not be positive about that. I know that Mr. Shannon told us that he owed McCarter some \$600.00 and there was some other items; I am not positive but I think there was a memorandum of the sums there.

I concluded from Mr. Shannon's appearance that his memory was defective and it occurred to me as possible or probable, in view of the contract of record between Shannon and McCarter, that he might have made a contract of that kind and forgotten all about it, or that his signature might have been procured to the instrument at a time when he was under the influence of liquor, and he have no knowledge of the transaction. I then drew up, simply based on my suspicions as to what might be the facts of the case, the paper which has been marked Exhibit "B" for identification, and gave it to Mr. Lammers with



(Testimony of F. M. Dudley.)

a request that he forward it to the attorney, or the gentleman who I understood was acting as attorney for Wm. McCarter, Mr. R. E. McFarland, I think it was, but the statements made in that affidavit were made by him without any direct information on which to base the same. I stated simply what appeared to me might be a possible solution of the apparent discrepancy between Mr. Shannon's statements and affidavit and the existence of a contract between Shannon and McCarter on the record, if John Shannon was the same Shannon.

Cross-examination.

(By Mr. McFARLAND.)

Q. In your first statement, Mr. Dudley, you say that before this deal was consummated you ascertained that the English contest [81] had been dismissed? A. Yes.

Q. Don't you know, as a matter of fact, that the English contest was not finally dismissed until Dec. 16, 1907?

A. I don't know anything about that. I know that the letter had been received from the Commissioner of the General Land Office disposing of it, that is what we acted upon.

Q. At that time English had never been notified of that letter having been received, had he?

A. That I don't know.

Q. You never looked that up?

A. No, I simply had the Commissioner's letter.

Q. Now, all of these other matters that you have testified to with reference to what took place in your

(Testimony of F. M. Dudley.)

office in Spokane on April 25, were matters which they told you and conclusions which you drew from the appearance of the different parties, and nothing that you knew as a matter of fact, aside from the actual transactions that took place?

A. Not personal knowledge, of course, except from the statements and transactions, the gentlemen executed these affidavits, that is the affidavits of both Mr. Shannon and Mr. Johnson, I think I wrote both of those affidavits myself and I had the abstract before me which showed the existence of a contract of record, between some John Shannon and Wm. McCarter purporting to affect this land.

Q. Now, referring to Protestant's Exhibit "B" which you testified about and which you say you prepared, isn't it a fact that you sent this affidavit, or had it sent to McCarter, believing he would sign it if he received the \$600.00?

A. I sent it or had it sent to him believing that if it were true he would sign it. [82]

Q. Isn't it a fact that the affidavit was returned to you, as indicated in another of protestant's exhibits, and that you returned it a second time to him saying that you would not accept anything else than the signing of this affidavit?

By Mr. ELDER.—Objected to as not binding upon Mr. Shannon, irrelevant and immaterial.

By the REGISTER.—Answer the question. It will be considered only so far as it is competent.

A. Mr. Lammers sometime, I won't say the exact date, brought to me the letter of May 15, 1907,

(Testimony of F. M. Dudley.)

marked "Protestant's Exhibit 'G' for identification." On June 11th, 1907, our firm answered that letter and I have a carbon copy of the answer which states its contents.

By Mr. McFARLAND.—Protestant asks to have letter referred to by Mr. Dudley marked "Protestant's Exhibit 'I' for identification."

Protestant now offers in evidence letter marked "Protestant's Exhibit 'I' for identification."

By Mr. ELDER.—Objected to as irrelevant and not binding.

By the REGISTER.—The letter will be admitted to be considered so far as it is found to be relevant and material.

By Mr. McFARLAND.—Protestant also refers to Commissioner's letter "H" dated Dec. 16, 1907.

By Mr. DUDLEY.—We now renew our motion to dismiss the contest for the reason that there has been no evidence introduced that would in any way affect the entry made by John Shannon of this land, and for the reason that the evidence is insufficient to justify any finding of fraud on the part of John Shannon or to support or justify the cancellation of the entry.

CASE CLOSED. [83]

**Exhibit "A" for Identification to Testimony Before Receiver [not Admitted]—Agreement, Dated September 24, 1908, Between John Shannon and Wm. McCarter.**

Instrument Number 8838.

This agreement, made and entered into this 24th

day September, 1906, by and between John Shannon, of Kootenai County, State of Idaho, party of the first part, and William McCarter, of Kootenai County, State of Idaho, party of the second part,

WITNESSETH, that the said party of the first part for and in consideration of the sum of one thousand dollars to him in hand paid, the receipt whereof is hereby acknowledged, and other valuable considerations, hereby agrees and binds himself, to convey to the said party of the second part, an undivided one-half interest in and to the S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  and NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  and SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  of Sec. 9, Tp. 44 N., R. 3 E., N. M., by good and sufficient warranty deed, as soon as he the said party of the first part, makes final homestead proof of the lands and premises and received his receiver's final receipt therefor.

IN WITNESS WHEREOF, said party of the first part has hereunto set his hand and seal the day and year first above written.

JOHN SHANNON. (Seal) [84]

State of Idaho,

County of Kootenai,—ss.

On this 24th day of September, in the year of 1906, before me, Edward P. Brennan, a Notary Public in and for the County of Kootenai, State of Idaho, personally appeared John Shannon, personally known to me to be the same person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal the day and



year in this certificate first above written.

[Seal]

EDWARD P. BRENNAN,

Notary Public.

Recorded at the request of T. L. Quarles, Jan. 21, 1907, at 9 o'clock A. M., in Book "E" of Agreements, page 589, Records of Shoshone County, State of Idaho.

STANLEY P. FAIRWEATHER,

County Recorder.

State of Idaho,

County of Shoshone,—ss.

I, Stanley P. Fairweather, County Recorder in and for the County of Shoshone, State of Idaho, do hereby certify the foregoing to be a full, true and correct copy of an agreement, between John Shannon and William McCarter as the original instrument appears upon the records of said county, in Book "E" of Agreements, at page 589 thereof, at my office and in my custody.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix my official seal this 19th day of May, A. D. 1908.

STANLEY P. FAIRWEATHER,

County Recorder.

By \_\_\_\_\_,

Deputy. [85]

**Exhibit "B" to Testimony Before Receiver—  
Affidavit of Wm. McCarter.**

State of Idaho,

County of Kootenai,—ss.

William McCarter, being first duly sworn, doth depose and say: That he is a citizen and resident of the

State of Idaho, residing at St. Maries, in Kootenai County, in said State. That he is the individual named as one of the parties to, and who executed that certain written contract dated September 24, 1906, and recorded in the office of the County Recorder of Shoshone County, Idaho, January 21, 1907, in Book "E" of Agreements, on page — thereof, whereby John Shannon agreed, for the considerations therein named, to convey to affiant an undivided one-half of the South Half (S.  $\frac{1}{2}$ ) of the Northwest Quarter (NW.  $\frac{1}{4}$ ) the Southwest Quarter (SW.  $\frac{1}{4}$ ) of the Northeast Quarter (NE.  $\frac{1}{4}$ ) and the Northeast Quarter (NE.  $\frac{1}{4}$ ) of the Southwest Quarter (SW.  $\frac{1}{4}$ ), of Section Nine (9), in Township Forty-four (44) North, of Range Three (3) East of the Boise Meridian, in Shoshone County, Idaho, as soon as said Shannon should make final homestead proof for said land and receive the receiver's final receipt therefor. That at the time of executing said contract the said Shannon was indebted to affiant in a large sum of money; and that affiant was very desirous of procuring some security for the payment thereof; and that affiant procured the signature of said Shannon to said contract solely for the purpose of holding the same as security by means of which he could compel said Shannon to pay such indebtedness; and that it was not the purpose or intention of affiant to ever assert any title to said lands, or to any interest therein, or in any therefor, under said contract. That affiant well knew, at the time of procuring said pretended agreement that the same was void and unenforceable, but that affiant believed

that he could, by means thereof, induce and compel said Shannon to pay to affiant [86] the indebtedness due to affiant from said Shannon. That at the time of executing and delivering said paper to affiant, the said Shannon had been drinking for many days; and was in such a condition, as the result of such drinking alcoholic drinks, that he, the said Shannon had no comprehension of his act, and thereafter had no recollection of executing or delivering such paper to affiant; and that the said Shannon has since believed, and now, as affiant is informed and believes, that he, said Shannon, never signed or delivered such contract, and that his signature thereto is a forgery. That it was never the purpose or intention of said Shannon to agree to convey to affiant said lands when he should enter the same, or any interest therein, or in any of them. That said paper was filed for record in the office of the county recorder of Shoshone County, Idaho, after affiant had been informed that said Shannon had conveyed said lands to one Joseph H. Johnson, for the purpose of using the same as a means whereby affiant could secure from said Shannon payment of the moneys owing by said Shannon to affiant.

That affiant never had any contract or agreement, direct or indirect, of any kind whatsoever, by which affiant was to receive, or by which said Shannon was to convey to affiant, or to anyone for the benefit of affiant, said lands, or any interest therein, or in any thereof, upon the entry of said lands by said Shannon under the provisions of the acts of Congress of the United States authorizing the sale of lands valu-

able for timber or stone; and that affiant has not now and never has had, any interest in or to said lands, or any thereof.

WM. McCARTER.

Subscribed and sworn to before me this —— day of April, A. D. 1907.

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Notary Public in and for the County of Kootenai, Idaho. [87]

**Exhibit "C" to Testimony Before Receiver [Option to D. J. McLaren, Dated February 14, 1907].**

Spokane, Wash., Feb. 14, 1907.

I, the undersigned, D. J. McLaren, hereby certify that I have the power of attorney in the form of an option on the following described lands:

The S.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$  and the SW.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$  and NE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  of Sec. 9 44, 3 East B. M., Shoshone County, Idaho, from J. H. Johnson, who is the present owner of record to above lands, and that I have this day for and in consideration of the sum of One (\$1.00) to me in hand paid, the receipt of which is hereby acknowledged, agreed to deliver the fee title to the above lands to R. C. Lammers, for a further consideration of \$8000.00 to be paid when Warranty Deed and Abstract is delivered.

DAN McLAREN.

Witness: ROY C. LAMMERS.

State of Washington,  
County of Spokane,—ss,

I, W. E. Cullen, Jr., a Notary Public in and for said County and State, do hereby certify that on



this 9th day of March, A. D., personally appeared before me Dan McLaren to me known to be the individual described in and who executed the within instrument, and acknowledged that he signed and sealed the same as his free and voluntary act and deed, for the uses and purposes therein mentioned.

WITNESS my hand and official seal the day and year in this certificate first above written.

[Seal]

W. E. CULLEN, Jr.,

Notary Public in and for the State of Washington,  
Residing at Spokane, Washington.

Recorded March 11, 1907, in Book "E" of Bonds and Agreements and Powers of Attorney, at page 626 thereof, records of Shoshone Co., Idaho. [88]

**Exhibit "D" to Testimony Before Receiver—  
Affidavit [of John Shannon].**

State of Washington,  
County of Spokane,—ss.

John Shannon, being first duly sworn, doth depose and say: That he is a citizen and resident of the State of Idaho, residing at Coeur d'Alene City, in said State. That he is the person who made entry for the south half (S.  $\frac{1}{2}$ ) of the northwest quarter (NW.  $\frac{1}{4}$ ), the southwest quarter (SW.  $\frac{1}{4}$ ) of the northeast quarter (NE.  $\frac{1}{4}$ ), and the northeast quarter (NE.  $\frac{1}{4}$ ) of the southwest quarter (SW.  $\frac{1}{4}$ ) of Section Nine (9), in Township Forty-four (44) North of Range Three (3) East, B. M., in Shoshone County, Idaho, under the provisions of the Act of Congress of the United States authorizing the sale of lands valuable for timber and stone; and that he is the grantor of that certain deed dated January 16, 1907,

recorded January 22, 1907, in the office of the County Recorder of Shoshone County, Idaho, in Book 32 of Deeds, at page — thereof, by which affiant conveyed said lands to Joseph H. Johnson; that affiant has heard read the affidavit of said Joseph H. Johnson made this day for the purpose of inducing R. C. Lammers to purchase said lands; and that the facts as stated in said affidavit are true. That affiant's attention has been called to an Abstract of Title to said lands which shows, among other things, an agreement between affiant and one William McCarter, dated September 24, 1906, and recorded in the office of the County Recorder of Shoshone County, Idaho, January 21, 1907, in Book "E" of Agreements, on page — thereof, by which it is recited that affiant agrees to convey an undivided half interest in and to said lands to said William McCarter as soon as affiant should make final homestead proof of said lands and receive the receiver's receipt therefor; that in truth and in fact affiant never made or signed such agreement, or any agreement, to [89] convey said lands, or any thereof, or any interest therein, to anyone, and that if there is any agreement such as purports to be shown in such abstract signed in affiant's name, the name is a forgery.

JOHN SHANNON.

Subscribed and sworn to before me this 25th day of April, A. D. 1907.

[Seal]

W. D. CULLEN, Jr.,  
Notary Public.

Recorded Aug. 7th, 1907, in Book "P," Misc., page 393 thereof. [90]

**Exhibit "E" to Testimony Before Receiver—  
Affidavit [of Joseph H. Johnson].**

State of Washington,  
County of Spokane,—ss.

Joseph H. Johnson, being first duly sworn, doth depose and say: That *is* is a resident and citizen of the State of Idaho, residing at Coeur d'Alene City, in said State. That he is the Joseph H. Johnson who is named as grantee in that certain deed dated January 16, 1907, executed by John Shannon as grantor, and recorded January 22, 1908, in the office of the County Recorder of Shoshone County, Idaho, in Book 32 of Deeds, at page —, by which deed said John Shannon conveyed to affiant the south half (S.  $\frac{1}{2}$ ) of the Northwest quarter (NW.  $\frac{1}{4}$ ), the southwest quarter (SW.  $\frac{1}{4}$ ) of the northeast quarter (NE.  $\frac{1}{4}$ ) and northeast quarter (NE.  $\frac{1}{4}$ ) of southwest quarter (SW.  $\frac{1}{4}$ ) of section Nine (9) in Township forty-four (44) north of range three East, B. M., in Shoshone County, Idaho; that said land was conveyed to affiant on the same day that said John Shannon made entry of the same, but that there was prior to the making of said entry, no contract or agreement of any kind whatsoever, direct or indirect, by which affiant was to receive said land, or any part thereof, to affiant or to anyone for the use or benefit of affiant. That affiant had loaned money to said Shannon and said Shannon was indebted to affiant at the time of making said entry, and that

after said entry had been made affiant requested said Shannon to convey said land to him, affiant, to secure affiant for the sums of money owing by said Shannon to affiant, and that said Shannon did so, and that the said deed from said Shannon to affiant was in truth and in fact a mortgage to secure to affiant the payment of said indebtedness. That this affidavit is made for the purpose of removing objections to the title to said property raised for the attorney for R. C. Lammers who is contemplating the purchase of said lands, and for the purpose of inducing said party to purchase said lands.

JOSEPH H. JOHNSON.

Subscribed and sworn to before me this 25th day of April, 1907.

[Seal]

W. E. CULLEN, Jr.,

Notary Public.

Recorded Aug. 7, 1907, in Book "P" Misc., page 392 thereof. [91]

**Exhibit "H" to Testimony Before Receiver—  
Not Admitted [Abstract of Title].**

**ABSTRACT OF TITLE**

To the South half of the Northwest quarter (S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ ) Southwest quarter of Northeast quarter (SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ ) Northeast quarter of Southwest quarter (NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ ) of Section Nine (9), in Township Forty-four (44) North, of Range Three (3) East of the Boise Meridian, in Shoshone County,



State of Idaho, containing 160 acres. [92]

AGREEMENT.

Dated, September 24, 1906.

Recorded, Jan. 21, 1907.

Book "E," Agreements, page 589.

JOHN SHANNON

and

WILLIAM McCARTER.

Duly acknowledged September 24, 1906, before Edward P. Brennan, a Notary Public in and for the County of Kootenai, State of Idaho. (Seal.)

WITNESSETH: That the said party of the first part for and in consideration of the sum of One Thousand Dollars to him in hand paid, the receipt whereof is hereby acknowledged, and other valuable considerations, hereby agrees and binds himself to convey to the said party of the second part an undivided one-half interest in and to the S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , and SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  of Sec. —, Tp. 44 N., R. 3 E., B. M., by and good sufficient warranty deed, as soon as he, the said party of the first part, makes final homestead proof of the said lands and premises and received his receiver's final receipt therefor. [93]

WARRANTY DEED.

Dated, January 16th, 1907.

Recorded Jan. 22, 1907.

Deed Book "32," page 293.

Consideration, \$9,000.00.

JOHN SHANNON (Single),

Grantor,

to

JOSEPH H. JOHNSON,

Grantee.

Witnesses, Two.

Duly acknowledged January 16, 1907, before Earl Sanders, a Notary Public, in and for the County of Kootenai, State of Idaho. (Seal.)

"Grant, bargain, sell, remise, release, alien and confirm."

Covenants of general warranty.

DESCRIPTION.

All the following described lot, piece or parcel of land, situated in the County of Shoshone and State of Idaho and known and described as follows, to wit:

South half of the northwest quarter (S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ ), Southwest quarter of the northeast quarter (SW.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$ ) and northeast quarter of southwest quarter (NE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ ) of Section Nine (9), Township Forty-four (44) North of Range Three (3) East of the Boise Meridian, situated in the County of Shoshone, State of Idaho, con-

taining one hundred and sixty (160) acres. [94]

## TAXES. JUDGMENTS AND LIENS

Not assessed on rolls of Shoshone County.	None.
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State of Idaho,  
County of Shoshone,—ss.

I, Stanley P. Fairweather, County Recorder in and for the County of Shoshone, State of Idaho, do hereby certify that the foregoing Abstract of Title, to the S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  of Section Nine in Township Forty-four North of Range Three East, Boise Meridian, consisting of TWO (2) items, is a full, true and correct abstract of title to said lands as the same appear upon the records of said county, and that no conveyances affecting the title to said lands are of record other than those set forth in this abstract.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in Wallace, Idaho, this 22d day of January, A. D. 1907, at the hour of 10 o'clock A. M.

STANLEY P. FAIRWEATHER. [95]

Spokane, Wash., Feb. 14th, 1907.

I, the undersigned, D. J. McLaren, hereby certify that I have the power of attorney in the form of an option on the following described lands:

The S.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$  and SW.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$  and NE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  of Sec. 9, 44, 3 East, B. M., Shoshone, Idaho, from J. H. Johnson, who is the present owner of record to above lands and that I have this day for and in consideration of the sum of One (\$1.00), to me in hand paid, the receipt of which is

hereby acknowledged, agreed to deliver the fee title to the above lands to R. C. Lammers, for a further consideration of \$8,000.00, to be paid when Warranty Deed and Abstract is delivered.

DAN McLAREN.

Witness: ROY C. LAMMERS.

State of Washington,  
County of Spokane,—ss.

I, W. E. Cullen, Jr., a Notary Public in and for said County and State, do hereby certify that on this 9th day of March, A. D. 1907, personally appeared before me Dan McLaren, to me known to be the individual described in and who executed the within instrument, and acknowledged that he signed and sealed the same as his free and voluntary act and deed, for the uses and purposes therein mentioned.

WITNESS my hand and official seal the day and year in this certificate first above written.

[Seal]

W. E. CULLEN, Jr.,

Notary Public in and for the State of Washington,  
Residing at Spokane, Washington.

Recorded March 11, 1907, in Book "E," of Bonds and Agreements and Powers of Attorney, at page 626 thereof, records of Shoshone Co., Idaho. [96]



## RECEIVER'S RECEIPT.

Dated January 16, 1907.

Recorded, August 7, 1907.

Book "P" Misc., page 391.

Consideration, \$400.00.

UNITED STATES OF AMERICA,

Grantor,

vs.

JOHN SHANNON,

Grantee.

No. 2500.

Being in full for S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  and  
NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  of Section No. 9 in Township No. 44  
N. of Range No. 3 E., B. M. Containing 160 acres  
and no hundredths at \$2.50 per acre. [97]

## WARRANTY DEED.

Dated April 25th, 1907.

Recorded, August 7, 1907.

Deed Book "34," page 485

Consideration, \$1.00.

JOSEPH H. JOHNSON (a Married Man),

Grantor,

to

R. C. LAMMERS,

Grantee.

Duly acknowledged April 25, 1907, before James  
H. Harte, a Notary Public in and for Kootenai  
County, State of Idaho. (Seal.)

“Grant, bargain, sell, remise, release, alien and confirm.”

Covenants of general warranty.

### DESCRIPTION.

All the following described lots, pieces or parcels of land, situated in the County of Shoshone, and State of Idaho, and known and described as follows, to wit:

South half of the northwest quarter (S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ ), southwest quarter of the *northeast* (SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ ) and the northeast quarter of the southwest quarter (NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ ) of Section Nine (9), Township Forty-four (44) North, of Range Three (3) East of Boise Meridian, containing one hundred and sixty acres according to the Government survey thereof.

(That the said Grantor has never lived upon said lands or made the same his home or together with his wife has he claimed the same as a homestead at any time.) [98]

### WARRANTY DEED.

Dated April 25th, 1907.

Recorded, August 7th, 1907.

Deed Book “34,” page 486.

Consideration, \$1.00.

JOHN SHANNON, Unmarried,

Grantor,

to

\_\_\_\_\_ ,

Grantee.

Duly acknowledged April 25, 1907, before W. E.

Cullen, Jr., a Notary Public in and for Spokane County, State of Washington. (Seal.)

“Grant, bargain, sell, remise, release, alien and confirm.”

Covenants of general warranty.

### DESCRIPTION.

All the following described lot, piece or parcel of land, situated in the County of Kootenai and State of Idaho, and known and described as follows, to wit:

South half of the northwest quarter (S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ ), southwest quarter of the northeast quarter (SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ ) and the northeast quarter of the southwest quarter (NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ ) of section nine (9), township forty-four (44) north of range three (3) East, Boise Meridian, containing one hundred sixty (160) acres according to the Government survey thereof. [99]

### TAXES.

### JUDGMENTS & LIENS.

Not assessed on rolls  
of Shoshone Co.

None.

State of Idaho,  
County of Shoshone,—ss.

I, Stanley P. Fairweather, County Recorder in and for the County of Shoshone, State of Idaho, do hereby certify that the foregoing pages, numbered from one (1) to six (6), inclusive, contains a full, true and correct Abstract of Title to the real property described in caption hereof, subsequent to January 22d, 1907 (that being the date of the certificate to the abstract of title of which this is a continuation) as appears from the official records of Shoshone County, Idaho.

And further certify that there are according to county indexes, no judgments, suits pending or liens of any kind against any of the within named grantees which are liens on the lands described herein, in any court of record in Shoshone County, that there are no taxes or assessments due or unpaid, that no tax deeds have been given thereon, and that there are no tax sales of said property unredeemed, during the period covered by this examination, viz.: From January 22, 1907, to January 6th, 1908, at the hour of five o'clock P. M.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix my official seal at my office in Wallace, Idaho, this 6th day of Jan., 1908.

STANLEY P. FAIRWEATHER,  
County Recorder. [100]

**Exhibit "I" [to Testimony Before Receiver—Option Dated April 17, 1907—J. H. Johnson to R. C. Lammers].**

Coeur d'Alene, Idaho, April 17th, 1907.

For and in consideration of the sum of \$1.00 to me in hand paid by R. C. Lammers, the receipt whereof is hereby acknowledged, I hereby give the said R. C. Lammers the exclusive option for a period of ten (10) days from the date hereof to complete the title and make the transfer to purchase at the price of eight thousand dollars the following described lands, to wit:

South half of the northwest quarter, southwest quarter of the northeast quarter and northeast quarter of the southwest quarter of section nine (9) in township forty-four (44) north of range three (3)



east, B. M., Shoshone County, Idaho. Time being the essence of this option.

(Signed) J. H. JOHNSON. [101]

DEPARTMENT OF THE INTERIOR.

UNITED STATES LAND OFFICE.

Coeur d'Alene, Idaho.

Involving the S.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  & the SW.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  & NW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 9, T. 44 N., R. 3 E., B. M.

CHARLES J. KINSOLVING,

Contestant,

vs.

JOHN SHANNON,

Contestee.

DECISION OF THE REGISTER AND  
RECEIVER.

On January 16th, 1907, final cash certificate No. 2300 was issued to John Shannon for the above-described land, the application to purchase the same under the timber and stone act having been filed in this office on September 26th, 1906.

The records of this office show that this land was formerly held by Shannon under homestead entry made July 17th, 1905, and that on September 25th, 1906, he offered proof in support of his application to commute said homestead entry. Said commutation proof was not completed for the reason that Shannon's testimony showed that he had made no cultivation of the land.

On September 26th, 1906, he relinquished said homestead entry and filed an application to purchase said land under the timber and stone act.

On July 16, 1907, the above-named contestant filed in this office an affidavit of contest against Shannon's entry under the timber and stone act, alleging

that on or about the 17th day of July, 1905, at the Coeur d'Alene, Idaho, land office, John Shannon made homestead entry for the S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 9, in Township 44, North of Range 3 East, B. M., and that thereafter the said Shannon made application to offer final proof on said homestead as a commutation cash entry which said application was duly and regularly published; that on the day set for offering said final proof, to wit, on the 26th day of September, 1906, the said Shannon relinquished said land to the government of the United States, and thereafter, on the said 26th day of September, 1906, made application, under the timber and stone act, to purchase the same, which said application and certificate is number 2500; that on the 16th day of January, 1907, said Shannon offered and [102] submitted his proof for said land, and, after the same had been submitted, your Receiver of the Coeur d'Alene, Idaho, Land Office, issued to him a receipt and certificate of purchase Number 2500.

That on the 24th day of September, 1906, the said John Shannon made, executed and entered into a written agreement with one William McCarter, under and by the terms of which he, the said Shannon was to deed and convey to the said William McCarter an undivided one-half inter-

est in and to the land sought to be purchased as aforesaid, when he, the said Shannon, had submitted his final proof and received the receiver's receipt therefor; that said written contract and agreement was recorded in the office of the County Recorder of Shoshone County, Idaho, on the 21st day of January, 1907, in Book "E" of Agreements.

That after said Shannon had submitted his final proof and received your Receiver's receipt therefor, he, the said Shannon, made and executed deed conveying said land to one Joseph H. Johnson, who, as affiant is informed and believes, subsequently conveyed said land to Roy C. Lammers and the McGoldrick Lumber Company, a corporation; that in paying to the Government of the United States the purchase price for said land, the money therefor was furnished to the said Shannon by other parties in consideration of the said Shannon giving to party furnishing said money a part of the consideration which he was to receive from the said Roy C. Lammers and the McGoldrick Lumber Company; that when the consideration for said conveyance as aforesaid was paid, the said Shannon did not receive more than a one-third thereof, the balance having been paid to the parties who had furnished him the money to make final proof.

Affiant further alleges upon information and belief, that the consideration paid by said Roy C. Lammers and the McGoldrick Lumber Company, for said land, was the sum of Eight Thou-

sand Dollars (\$8000.00) and that the said Shannon did not receive more than Two Thousand Dollars (\$2000.00) thereof.

That all of the matters herein alleged are matters of record within the United States Land Office and the office of the County Recorder of Shoshone County, Idaho, and are within the knowledge of the special agents representing the Government of the United States.

On account of the matters and things above set forth affiant alleges, that said timber and stone entry No. 2500 was made for speculative purposes and not for the sole and exclusive benefit of said applicant, John Shannon; and that said John Shannon, by reason of his agreements and contracts as aforesaid, did not receive the full consideration and value of said land.

This affidavit was forwarded to the Commissioner of the General Land Office and by letter "R" dated December 17th, 1907, the Assistant Commissioner of the General Office directed that the contestant be allowed thirty days in which to appear and apply for notice and proceed with the contest. Notice of said letter was served on the contestant and application for notice of hearing was duly made by him. [103]

On February 28th, 1908, notice of hearing was issued to said parties citing them to appear at the local land office on May 13th, 1908, to submit testimony touching allegations of the contest affidavit. Service of the notice of hearing was made by publication.

Two continuances were granted in this case and



the taking of testimony began on May 21st, 1908. Kinsolving and Shannon appeared in person and by counsel, Kinsolving being represented by S. L. McFarland and Shannon by Robert H. Elder. Roy C. Lammers, who is shown to have purchased the land from Shannon for the McGoldrick Lumber Company and F. M. Dudley, appeared as counsel for Lammers and said company. It seems to us that the charge made in the contest affidavit of a contract made by Shannon, with one William McCarter, can hardly be considered in this case since the allegations refer to an alleged agreement in regard to the perfecting of his homestead entry, but even if it could be considered in this case we consider the evidence as hardly sufficient to establish the fact that such a contract was entered into by Shannon. There are certain circumstances, however, that point very strongly to the fact that such an agreement was made between Shannon and McCarter.

We think that the principal, if not the only, question to be determined in this case is whether or not "said timber and stone entry No. 2500 was made for speculative purposes and not for the sole and exclusive benefit of said applicant, John Shannon." The evidence shows that on the day on which Shannon made his final entry under the timber and stone act, he executed and delivered a deed for all of the land entered by him to Joseph H. Johnson for the expressed consideration of \$9,000.00. This deed Johnson claims to have been given to him for the purpose of securing the payment of certain amounts of money which were owing to him at that time by Shannon.

Just what was the aggregate of such indebtedness Johnson himself was not able to state, but according to his claim the indebtedness was for bills contracted by Shannon at Johnson's lodging-house and bar and for various amounts [104] of money alleged to have been loaned to Shannon by Johnson. Altho Johnson claims this deed was in fact a mortgage he appears to have given at least two options for the purchase of said land, one to Dan McLaren dated February 14th, 1907, and the other to Roy C. Lammers dated April 17, 1907. The latter option finally resulted in the sale of the land to Lammers on April 25th, 1907, for \$8,000.00.

At the time of the consummation of this sale to Lammers, Lammers, at the request of Shannon, paid to Johnson the sum of \$2,939.00 and to other persons various amounts and paid to Shannon himself, only \$1,757.00. \$1,000.00 of the purchase price was withheld by Lammers to protect himself against possible difficulty in obtaining patent for the land. It does not satisfactorily appear in the evidence what was the basis of the claim of Johnson against Shannon for the sum of \$2,939.00. That Shannon could have had credit for an amount of lodging and liquor in one year's time sufficient to have made anything like such a claim as this against him is incredible and it is equally incredible that Johnson would have loaned, without security, to such a man as Shannon, any such large amount of money as this. Shannon is an ignorant man who has still further incapacitated himself by the excessive use of liquor. This is shown

by Johnson's testimony at page 43 of the transcript, which is as follows:

"Q. Mr. Johnson, I believe you stated that Mr. Shannon used liquor and has since you have known him, very excessively?

A. Yes, sir.

Q. I will ask you whether or not that his excessive use of liquor has impaired his memory and mental faculties.

A. I think so, yes."

If Shannon did in fact obtain from Johnson, prior to his timber proof, any such sum of money as Johnson claims to have furnished him, it is our opinion that this money was used in making his final proof and purchase of the land.

We do not find any direct evidence showing that an agreement between Shannon and anyone else prior to the filing of his timber [105] application, or even prior to the submitting of his proof, had been entered into to convey all or any portion of the land or to give anyone any interest therein, but in the light of his subsequent actions or acts we are inclined to believe that there was such an understanding and that his conveyance of the land immediately after proof was pursuant to such an agreement. Shannon had no recollection of making any conveyance immediately after his proof and it seems to us probable that at the time of making an agreement to convey, if such an agreement was made prior to proof, he may have been in such condition as not to show what he was doing. It is impossible for us to read the evidence in this case without feeling certain that

Shannon was the victim of someone stronger and wiser than he. We think the record will sustain the view that the entry was made for speculative purposes and not for the sole and exclusive benefit of the applicant and for this reason we recommend that the entry be cancelled.

R. M. DUNN,

Register.

WILLIAM ASPLEY,

Receiver. [106]

**Exhibit "G" [Letter, December 14, 1909, Register to McGoldrick Lumber Co.].**

DEPARTMENT OF THE INTERIOR,  
UNITED STATES LAND OFFICE.

Coeur d'Alene, Idaho.

0668

December 14, 1909.

McGoldrick Lumber Company,  
Spokane, Wash.

In reference to case of Kinsolving vs. Shannon, Lammers and McGoldrick Lbr. Co. involving Shannon's T. & S. application.

You are advised that under date of May 29, 1909, the Assistant Commissioner of the General Land Office affirmed the decision of this office and held the entry for cancellation.

Sixty days from notice are allowed within which to appeal from his decision to the Secretary of the Interior; and upon your failure to take action within the time specified the case will be reported for appropriate action.



A copy of the decision is inclosed.

Very respectfully,

W. H. BATTING,

Register.

Notice this day to Lammers and Shannon. [107]

**[Opinion of Assistant Commissioner, General Land  
Office, May 29, 1909.]**

DEPARTMENT OF THE INTERIOR.

GENERAL LAND OFFICE.

Washington, D. C., May 29, 1909.

Held for Cancellation. Affirmed.

CHARLES J. KINSOLVING,

vs.

JOHN SHANNON, ROY C. LAMMERS, Mc-  
GOLDRICK LUMBER CO.

Register and Receiver,

Coeur d'Alene, Idaho.

Sirs:

On September 26, 1906, John Shannon filed his timber and stone application for the purchase of the S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  and NW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 9, T. 44. N., R. 3 E., B. M., upon which he made proof and payment and received Cash Certificate No. 2500 on January 16, 1907.

On July 16, 1907, Charles J. Kinsolving filed his affidavit of contest against said entry, charging that the same had not been made for the sole use and benefit of Shannon but for speculative purposes and stating in detail the facts upon which the charge was based, which need not be here repeated as they are substantially embodied in the synopsis of the testi-

mony set forth below. A hearing upon Kinsolving's affidavit was ordered by letter "H" of December 17, 1907, and pursuant to notice personally served, the parties appeared in person and by attorney before you on May 21, 1908, and submitted testimony. Roy C. Lammers, who is shown to have purchased the land from Shannon for the McGoldrick Lumber Company, and the said McGoldrick Lumber Company also appeared and participated in the trial. From your decision recommending the cancellation of the entry, the defendants have appealed to this office.

The facts disclosed by the record admit of no doubt as to the correctness of your decision. Shannon made a homestead entry for the land in controversy on July 17, 1905, entered into a written [108] agreement on September 24, 1906, with one McCarter to convey to the latter a one-half interest therein, offered commutation proof on September 25, 1906, which was not completed for the reason that his testimony showed no cultivation of the tract, and on September 26, 1906, he relinquished said entry and made the one under consideration.

On the day upon which he submitted proof on the latter entry, Shannon conveyed the land by deed to one Johnson, a saloon and lodging-house keeper. Shannon appears to have had no knowledge before execution either of this deed or of the agreement with McCarter above referred to. He is without means, drunken, imbecile and, clearly, the pliant tool of stronger minds that have used him in the attempt to acquire title to this land. Johnson's testimony as to his transaction with Shannon bears every earmark

of perjury and fraud. Though he insisted that the deed from Shannon to himself was merely a mortgage to secure an indebtedness, he could not state the amount of such indebtedness nor would he venture to swear that it amounted to \$1,000, notwithstanding the fact that from the proceeds of the subsequent sale of the land to Lammers as agent of the McGoldrick Lumber Company, he retained the sum of \$2,939 as his share of the booty and \$600 more went to McCarter, who was not present at the hearing. Of the \$8,000 for which the land was sold, Shannon received \$1,757. No explanation of the source of the money with which the entryman paid the purchase price is offered by the testimony, except his statement that he received five one hundred dollar bills from a brother by ordinary mail.

While there is no direct evidence of any agreement to convey this land having been made by Shannon prior to his purchase thereof, the circumstantial evidence that the entry was not made for his sole use and benefit is convincing.

Your decision is affirmed subject to defendants' right of appeal to the Department.

So advise the parties and in due season report.

Respectfully,

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Assistant Commissioner. [109]

**Exhibit "H" [Decision, May 10, 1910, First  
Assistant Secretary].**

**DEPARTMENT OF THE INTERIOR.  
WASHINGTON.**

May 10, 1910.

E-3255.

"H." 0668, Coeur d'Alene,  
T. & S. C. C. 2500 Cancellation.  
Appeal. Affirmed.

**CHARLES J. KINSOLVING**

vs.

**JOHN SHANNON, ROY C. LAMMERS, Mc-  
GOLDRICK LUMBER CO.**

The Commissioner of the  
General Land Office.

Sir:—

Roy C. Lammers and McGoldrick Lumber Company, being the real parties in interest as transferees, have appealed to the Department from your decision of May 29th, 1909, sustaining the action of the local officers and holding for cancellation timber and stone cash entry number 2500 based upon the timber and stone application of John Shannon, filed September 26, 1906, for the purchase of the S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , and NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 9, T. 44 N., R. 3 E., B. M., Coeur d'Alene, Idaho land district. Proof was duly submitted, payment made, and cash certificate number 2500 issued to John Shannon, January 16, 1908.

July 16, 1907, Charles J. Kinsolving filed his affi-



davit of contest against said entry, charging that same had not been made for the sole use and benefit of Shannon, but for speculative purposes, and stating in detail the facts upon which the charge was based.

Hearing upon Kinsolving's affidavit was ordered by your office letter "H," December 17, 1907. Notice was served upon the parties in interest, including Roy C. Lammers and the McGoldrick Lumber Company, and the hearing took place before the local officers in May, 1908, all the parties in interest appearing either in person [110] or by counsel with witnesses and submitting testimony.

The record has been carefully examined in connection with the briefs filed upon this appeal and no reason is found to differ from the concurring conclusions of your office and the local officers that it is shown by the evidence that this entry was made for speculative purposes and not for the sole and exclusive benefit of the applicant. It is true that the cancellation of this entry involves the loss of considerable money to the real party in interest—the McGoldrick Lumber Company, but the Department is convinced from the circumstances disclosed by the record that said company, through its acting agents, had before making purchase of this claim knowledge of facts sufficient to put it upon inquiry, by which it could have easily ascertained the true condition of affairs in regard to this entry. In fact, it is difficult to believe that the persons making the purchase for said company were not aware of the wrongful conditions concerning this entry before making purchase of the land embraced therein.

Your decision is accordingly affirmed and the papers are herewith returned.

Very respectfully,

Signed: FRANK PIERCE,

First Assistant Secretary.

[Endorsed]: Filed Oct. 9, 1911. A. L. Richardson,  
Clerk. [111]

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*In the Circuit Court of the United States for the  
Ninth Circuit, District of Idaho, Northern Divi-  
sion, Holding Terms at Coeur d'Alene.*

McGOLDRICK LUMBER CO.,

Complainant,

vs.

CHARLES J. KINSOLVING and JANE DOE  
KINSOLVING (Whose Real Name is Un-  
known), His Wife; MILWAUKEE LUMBER  
COMPANY, a Corporation, JOHN DOE  
LUNDQUIST (Whose True Name is Un-  
known), and RICHARD ROE LINDQUIST  
(Whose True Name is Unknown), JOHN  
DOE (Whose Real Name is Unknown), and  
RICHARD ROE (Whose True Name is Un-  
known),

Defendants.

**Amended and Supplemental Bill of Complaint.**

AMENDED AND SUPPLEMENTAL BILL OF  
COMPLAINT OF THE McGOLDRICK LUM-  
BER CO., A CORPORATION, EXHIBITED  
AGAINST THE DEFENDANTS ABOVE  
NAMED, Charles J. Kinsolving and Jane Doe

Kinsolving (Whose Real Name is Unknown), His Wife; Milwaukee Lumber Company, a Corporation; John Doe Lundquist (Whose True Name is Unknown); and Richard Roe Lindquist (Whose True Name is Unknown); John Doe, (Whose True Name is Unknown), and Richard Roe (Whose True Name is Unknown).

To the Honorable Judges of the Circuit Court of the United States of the Ninth Circuit, in and for the District of Idaho, Northern Division, in Equity Sitting:

The McGoldrick Lumber Co., a corporation of the State of Washington and a resident and citizen of the said State, brings this its amended and supplemental bill of complaint against Charles J. Kinsolving, and Jane Doe Kinsolving (whose real name is unknown), his wife; Milwaukee Lumber Company, a [112] corporation; John Doe Lundquist (whose real name is unknown); Richard Roe Lindquist (whose real name is unknown); John Doe (whose real name is unknown), and Richard Roe (whose real name is unknown), defendants, all citizens of the State of Idaho, residing at St. Maries, Kootenai County, Idaho, and respectfully shows unto your Honors:

I.

That the above-named complainant, McGoldrick Lumber Co., is a corporation organized and existing under and virtue of the laws of the State of Washington, and now is, and during all the times hereinafter mentioned was, a citizen and resident of the said State of Washington, and that on the — day

of October, A. D. 1911, your orator exhibited its original bill of complaint in this Honorable Court against Charles J. Kinsolving and Jane Doe Kinsolving (whose real name is unknown), his wife, being citizens and residents of the State of Idaho, living and residing at St. Maries in the County of Kootenai, and State of Idaho, alleging that one John Shannon being then and there a citizen and resident of the State of Idaho, and a citizen of the United States, had on the 26th day of September, 1906, made entry under the laws of the United States for cash purchase of timber and stone lands, being the Act of Congress of June 3, 1878, to the South Half of the Northwest Quarter (S.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$ ), the Southwest Quarter of the Northeast Quarter (SW.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$ ), and the Northeast Quarter of the Southwest Quarter (NE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ ), of Section Nine (9), Township Forty-four (44) North, Range Three (3) East of the Boise Meridian, in Shoshone County, Idaho, and had on the 16th day of January, 1907, made his final proof before the Register of the Land Office at Coeur d'Alene, Idaho, and had received from the Receiver of the United States Land Office at Coeur d'Alene, Idaho, Receiver's Receipt for the said land numbered "Timber & Stone Entry No. 2500," [113] and had thereafter and on the 25th day of April, 1907, sold and transferred by warranty deed to your orator the said land for the sum of *Eight Thousand* (\$8,000.00), and that your orator was then and there a *bona fide* purchaser of said land, and that thereafter and on the 16th day of July, 1907, the above-named defendant, Charles J.



Kinsolving, instituted a contest against the entry of the said lands by the said John Shannon upon the ground that the same was made for speculative purposes and not for the sole and exclusive benefit of the said applicant, John Shannon, which said contest the register and receiver of the said United States Land Office at Coeur d'Alene, Idaho, on or about the — day of —, 1908, sustained, from which said decision your orator duly appealed to the Honorable Commissioners of the General Land Office, and to the Honorable Secretary of the Interior, who affirmed the decision of the register and receiver of the said United States Land Office at Coeur d'Alene, Idaho, and cancelled the said entry of the said John Shannon, and thereafter and on the 27th day of March, 1911, the United States of America by and through its legally constituted officers made and caused to be delivered to said defendant, Charles J. Kinsolving, a patent of the South Half of the Northwest Quarter (S.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$ ), the Southwest Quarter of the Northeast Quarter (SW.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$ ), the Northeast Quarter of the Southwest Quarter (NE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ ) of Section Nine (9), Township Forty-four (44) North, Range Three (3) E., B. M., in Shoshone County, Idaho; that thereupon your orator exhibited a bill of complaint before your Honorable Court claiming that the register and receiver of the local land office had erred in law in making and rendering their said decision and that the Honorable Commissioner of the General Land Office and the Honorable Secretary of the Interior had each erred in law in affirming the deci-

sion of the said register and receiver of the said United States Land Office at Coeur d'Alene, Idaho, all as set forth in said original bill of complaint of your orator to which [114] reference is duly made as if the said bill were incorporated herein and praying that it be decreed by your Honors that your orator is the owner of the said South Half of the Northwest Quarter (S.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$ ), the Southwest Quarter of the Northeast Quarter (SW.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$ ), the Northeast Quarter of the Southwest Quarter (NE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ ), of Section Nine (9), Township Forty-four (44) North, Range Three (3) East, B. M., in Shoshone County, Idaho, and that the said defendants, Charles J. Kinsolving, and Jane Doe Kinsolving (whose real name is unknown), his wife, be decreed to be the owners of the title by, through and under the patent of the United States so far as the same relates to the said land in trust for your orator this complainant, and for its uses and benefits, and that the said defendants be required by said decree to convey to your orator, its successors and assigns, said premises, and the whole thereof, and that said title of said defendants in and to said property existing under and by virtue of the said patent, be cancelled and *and* that your orator be permitted to make application for patent to the said premises under the provisions of the laws of the United States covering the entry made by the said John Shannon.

## II.

That the above-named defendant, Milwaukee Lumber Company, is a corporation organized and

existing under and by virtue of the laws of the State of Idaho, with its principal place of business at St. Maries, in the County of Kootenai, in said State, and that the same now is, and during all the times hereinafter mentioned was, a citizen and resident of said State of Idaho.

### III.

That the above-named defendants, Charles J. Kinsolving and Jane Doe Kinsolving (whose real name is unknown), his wife; Milwaukee Lumber Company, a corporation; John Doe Lundquist [115] (whose real name is unknown); and Richard Roe Lindquist (whose true name is unknown); and John Doe (whose true name is unknown), and Richard Roe (whose true name is unknown), are, and each of them is, a citizen and resident of the State of Idaho, living and residing at St. Maries, in the County of Kootenai, in the State of Idaho.

### IV.

That on the 15th day of September, 1911, the above-named defendant, Charles J. Kinsolving, pretended to transfer and convey by quitclaim deed the above-described property to the above-named defendant, the Milwaukee Lumber Company, which said deed was recorded in the County of Shoshone and State of Idaho, in Book 42, page 149 of the records of said County of Shoshone, on the 29th day of September, 1911.

But your orator alleges that the said transfer was without consideration and was made in fraud of the rights of your orator in the premises, and was made by and through a conspiracy entered into by the said

Charles J. Kinsolving and the said Milwaukee Lumber Company in an effort to defeat the rights of your orator in the premises.

V.

Your orator further shows unto your Honors that the said above-described land has thereon a large amount of white pine and other timber suitable for the purpose of manufacturing into logs, and is valuable solely for its said timber, and that the value of said land is largely destroyed if the said timber is cut and removed therefrom.

VI.

That on or about the 1st day of October, 1911, the said Charles J. Kinsolving and the said Milwaukee Lumber Company to carry out their said conspiracy and to defeat the rights of your orator in the premises entered upon the said land by and through his and their agents, contractors, servants [116] and employees, being the above-named defendants, Charles J. Kinsolving and Jane Doe Kinsolving (whose true name is unknown), his wife; Milwaukee Lumber Company, a corporation; John Doe Lundquist (whose true name is unknown); Richard Roe Lindquist (whose true name is unknown); John Doe (whose true name is unknown), and Richard Roe (whose true name is unknown), and commenced to cut and remove the timber from the said land and to log the same for the purpose of converting the said timber into lumber and destroying the value of the said land so far as your orator is concerned, and are now engaged in cutting and removing the timber from the said land, and in logging the same for the



purpose of manufacturing the said timber into lumber, and threaten to and will continue to so cut and remove the timber from the said land and to log the same for the purpose of manufacturing the same into lumber unless restrained by your Honors from so doing.

#### VII.

And your orator further shows that the said defendant, Charles J. Kinsolving, is a man of small means, if any, and is wholly unable to respond to complainant in damages if he be permitted to cut and remove the said timber, and that he is the party mainly interested in the same under his agreement with the Milwaukee Lumber Company.

#### VIII.

And your orator further shows that it is a corporation owning and possessing large amounts of land in the State of Idaho, and fully able to respond in damages to the said defendants for any harm or damage that may be done if an injunction be issued restraining the said defendants from cutting and removing the said timber until the determination of this action as to the title to the said land, and that all of the threats, acts, doings and pretenses of the said defendants hereinbefore set forth are contrary to equity and good conscience and tend to the manifest wrong, injury and [117] oppression of your orator in the premises, and that if an injunction is not issued to your Honors, the value of the said land to your orator should your Honors recover in this action will be wholly destroyed.

IN CONSIDERATION WHEREOF, and for as

much as your orator is remediless in the premises, at and by the strict rules of common law, and can only have relief in a court of equity, where matters of this nature are properly cognizable and relievable;

May it please your Honors to grant unto your orator a writ of subpoena to be directed to the said Milwaukee Lumber Company, an Idaho corporation, and a citizen and resident of the said State of Idaho, and to John Doe Lundquist (whose true name is unknown); Richard Roe Lindquist (whose true name is unknown); John Doe (whose true name is unknown) and Richard Roe (whose true name is unknown), all citizens and residents of the said State of Idaho, residing at St. Maries, Kootenai County, Idaho, commanding them and each of them at a certain time and at a certain penalty therein to be limited, to personally appear before your Honors, and then and there full, true, direct and perfect answer make to all and singular the premises, but not under oath (an answer under oath being hereby expressly waived); and further to stand to and abide such further order, direction or decree herein as to your Honors shall seem meet and proper, and particularly to the end that the said defendant, Milwaukee Lumber Company, an Idaho corporation, may show why your orator may not have the relief prayed for and give answer, but not under oath, fully and truly to all the matters herein stated, and that your orator may have the same relief against the Milwaukee Lumber Company as it would be entitled to against the said defendant Charles J. Kinsolving, had he not transferred the said property to the [118] said

Milwaukee Lumber Company.

That it may be decreed by your Honors that your orator is the owner of the said South Half of the Northwest Quarter (S.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$ ), the Southwest Quarter of the Northeast Quarter (SW.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$ ), the Northeast Quarter of the Southwest Quarter (NE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ ) of Section Nine (9), Township forty-four (44) North, Range Three (3) East of the Boise Meridian, in Shoshone County, Idaho, and that the defendant Charles J. Kinsolving and Jane Doe Kinsolving, his wife, and the said Milwaukee Lumber Company, be decreed to be the holders of the title by, through and under the patent of the United States so far as the same relates to the said land in trust, however, for your orator, this complainant, and for its uses and benefit, and that the said defendants be required by said decree to convey to your orator, its successors or assigns, said premises and the whole thereof, and that said title of said defendants in and to said property existing under and by virtue of the said patent be cancelled and annulled, and that your orator be permitted to make application for patent to the said premises under the provisions and laws of the United States covering the entry hereinabove set forth.

That the defendants and each of them be restrained and enjoined by order of this Court from encumbering or disposing of said premises, or any interest therein pending the final determination of this action, and may it please your Honors further to grant unto your orator an order without notice restraining said defendants, and each of them, their

servants, agents and employees from cutting and removing any timber from the said land, or from logging the same, or from committing any acts or waste thereon, and that a writ of injunction *pendente lite* issue out of in accordance with the rules and practice of this Honorable Court, to be directed to the said defendants, and each and all of them, to restrain [119] them and each of them, their agents, servants and employees, from cutting and logging any timber from the said land, or from logging the same or from committing any act of waste thereon until the final determination of this action, and the determination of the title of your orator to the said land, and that at the final hearing such injunction may be made permanent, and that your orator may have such other and further relief as shall be meet, right and equitable in the premises.

McGOLDRICK LUMBER CO.,

By J. P. McGOLDRICK.

F. M. DUDLEY,

CULLEN, LEE & FOSTER,

Solicitors for Complainant, 500 Traders Block, Spokane, Wash. [120]

United States of America,

State of Washington,

County of Spokane,—ss.

J. P. McGoldrick, being first duly sworn, on oath deposes and says: That the above-named complainant, the McGoldrick Lumber Co., is a corporation organized and existing under and by virtue of the laws of the State of Washington, and he is an officer thereof, to wit, its President; that he has read the



foregoing bill of complaint, and knows the contents thereof, and the same is true except as to those matters therein stated to be upon information and belief, and as to those he believes them to be true.

J. P. McGOLDRICK.

Subscribed and sworn to before me this 14th day of October, 1911.

W. E. CULLEN, Jr.,

Notary Public in and for the State of Washington,  
Residing at Spokane.

[Endorsed]: Filed Oct. 16, 1911. A. L. Richardson, Clerk. [121]

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*In the Circuit Court of the United States for the  
Ninth Circuit, District of Idaho, Northern Division,  
Holding Terms at Coeur d'Alene, Idaho.*

McGOLDRICK LUMBER COMPANY,

Complainant,

vs.

CHAS. J. KINSOLVING and JANE DOE KINSOLVING, Whose Real Name is Unknown, His Wife; MILWAUKEE LUMBER COMPANY, a Corporation; JOHN DOE LUNDQUIST, Whose True Name is LYN LUNDQUIST and RICHARD ROE LINDQUIST, Whose True Name is ELIX LINDQUIST; JOHN DOE, Whose Real Name is Unknown; and RICHARD ROE, Whose Name is Unknown.

**Demurrer of Defendants Lyn Lundquist and Elix  
Lindquist.**

Comes now the defendants, Lyn Lundquist and Elix Lindquist, a copartnership, doing business under the firm name and style of Lundquist and Lindquist, being the defendants above named as John Doe Lundquist and Richard Roe Lindquist, and demur to the complaint of plaintiff herein on the ground and for the reason,

1. That the Court has no jurisdiction of the subject matter of the action.

2. That the complainant does not state facts sufficient to constitute a cause of action.

A. G. ELSTON,

Solicitor and Counselor for Defendants, Lundquist  
& Lindquist. [122]

State of Washington,

County of Spokane,—ss.

I, A. G. Elston, do hereby certify that I am a member of the bar of the above-entitled court in good standing, that the foregoing demurrer is not interposed for the purpose of delay and that in my opinion it is well founded in point of law.

A. G. ELSTON.

[Endorsed]: Filed Nov. 18, 1911. A. L. Richardson, Clerk. [123]

*In the Circuit Court of the United States for the  
District of Idaho, Northern Division.*

McGOLDRICK LUMBER COMPANY,

Complainant,

vs.

CHARLES J. KINSOLVING and JANE DOE  
KINSOLVING, His Wife; MILWAUKEE  
LUMBER COMPANY, a Corporation,  
JOHN DOE LUNDQUIST and RICHARD  
ROE LINDQUIST et al.,

Defendants.

**Demurrer of Defendants Charles J. Kinsolving and  
Jane Doe Kinsolving (Whose Real Name is  
Julia E. Kinsolving), His Wife.**

The demurrer of the above-named defendants Charles J. Kinsolving and Jane Doe Kinsolving, his wife (whose real name is Julia E. Kinsolving), and Milwaukee Lumber Company, a corporation, to the bill of complaint and amended and supplemental bill of complaint of the above-named plaintiff.

These defendants and each and every of them by protestations not confessing or acknowledging all or any of the matters or things in said bill of complaint and amended and supplemental bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, demur to the said bill of complaint and supplemental bill of complaint and for causes of demurrer show:

I.

That the plaintiff has not in and by its said bill of

complaint or amended and supplemental bill of complaint, or either or both of them, made or stated such a case as entitles it in a court of equity to the relief prayed for in either or both of said bills of complaint, or to any discovery or relief from or against these defendants, or either of them, touching the matters contained in said bills of complaint or either or both of them, or any such matters. [124]

## II.

That it appears from the bill of complaint and exhibits filed therewith and the supplemental bill of complaint that this Court has no jurisdiction to hear and determine this action for the following reasons:

(a) That it appears in this case from the pleadings and exhibits therein that all matters and issues *raised* by the pleadings herein have been tried before the Department of Interior and that said department had exclusive jurisdiction to try and determine such matters and issues.

(b) That all the matters and issues raised by the bill of complaint and supplemental bill of complaint with the exhibits thereto attached are issues of fact and not of law and that the finding of the Register and Receiver of the Coeur d'Alene Land Office and affirmed by the Commissioner of the General Land and the Secretary of the Interior as appears from the exhibits filed with the bill of complaint herein and supplemental bill thereto, were findings upon issues of fact tried before said Department and based upon evidence taken in support thereof and the action of said department is not reviewable by this Court.



## III.

That said bill of complaint and amended and supplemental bill of complaint are and each of them is wholly without equity.

Because plaintiff had an adequate remedy at law and has had its day in court, and all matters and issues raised by said bill and supplemental bill of complaint appear to have been tried and determined by the proper tribunal having exclusive jurisdiction to try the same.

Wherefore, and for divers other good causes of demurrer appearing in the said bill and supplemental bill and exhibits filed therewith, these defendants do demur thereto and to each and both of said bills of complaint, and pray the judgment of this Honorable Court whether they or any of them shall be compelled to make any further or other answer to the said bill or amended and supplemental bill, and they and each of them humbly pray to be hence dismissed with their reasonable costs in this behalf sustained.

R. B. NORRIS,

FORNEY & MOORE,

Solicitors for said Defendants. [125]

Residence and postoffice address of R. B. Norris at St. Maries, Idaho, and Forney & Moore, at Moscow, Idaho.

We hereby certify that the foregoing demurrer is, in our opinion, well founded in point of law.

FRANK L. MOORE,

Of Counsel for Defendants, Solicitors for said Defendants.

Dated at St. Maries, this 2d day of December, A. D. 1911, State of Idaho.

State of Idaho,  
County of Kootenai,  
District of Idaho,—ss.

Charles J. Kinsolving, being first duly sworn, upon oath deposes and says: I am the same Charles J. Kinsolving, named as one of the defendants in the above-entitled action and make this affidavit for and on behalf of myself and the other demurring defendants mentioned in the foregoing demurrer, and that the foregoing demurrer is not interposed for the purpose of delay.

CHARLES J. KINSOLVING.

Subscribed and sworn to before me this 2d day of December, A. D. 1911.

[N. P. Seal]      WILLIAM F. SARGENT,  
Notary Public in and for said County and State.

[Endorsed]: Filed December 4, 1911. A. L. Richardson, Clerk. By M. W. Griffith, Deputy. [126]

*In the District Court of the United States for the  
District of Idaho, Northern Division.*

McGOLDRICK LUMBER COMPANY,

Complainant,

vs.

CHARLES J. KINSOLVING, and JANE DOE  
KINSOLVING, His Wife; MILWAUKEE  
LUMBER COMPANY, a Corporation, and  
LYNDQUIST and LUNDQUIST, Copart-  
ners,

Defendants.

**Opinion on Demurrer to Complaint.**

September 5, 1912.

F. M. DUDLEY, and HAPPY, CULLEN, LEE  
and HINDMAN, Attorneys for Plaintiff.

FORNEY & MOORE and A. G. ELSTON, At-  
torneys for Defendants.

DIETRICH, District Judge.

The principal question raised upon demurrer is not free from great doubt. If the land department had before it any substantial evidence upon which to base its findings of fact, they should not be disturbed. If, upon the other hand, it proceeded without such evidence, it erred as a matter of law, and therefore its action is here reviewable. Under the construction placed upon the "Timber and Stone Act" in the Williamson case (207 U. S. 425), decided after the action of the land department here complained of had been taken, it must be held that the evidence of fraud adduced in the contest is at best

but remotely circumstantial and extremely meager, and, upon the other hand, the circumstances are sufficient at least to raise a suspicion of fraud. In this condition it is [127] thought not to be improper to overrule the demurrer without prejudice to the right of the defendants again to urge the point upon the final hearing.

Kansas vs. Colorado, 185 U. S. 125.

Sneyder vs. DeForest, etc., 154 Fed. 142.

Accordingly, an order will be entered overruling the demurrer without prejudice, and giving defendants thirty days in which to answer.

[Endorsed]: Filed September 6, 1912. A. L. Richardson, Clerk. [128]

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**[Order Overruling Demurrer, etc.]**

At a stated term of the District Court of the United States, for the District of Idaho, held at Boise, Idaho, on Saturday, the 7th day of September, 1912. Present: Hon. FRANK S. DIETRICH, Judge.

No. 519—N. D.

McGOLDRICK LUMBER COMPANY

vs.

CHARLES J. KINSOLVING et al.

An opinion upon the demurrer to the complaint herein having been filed on the 6th inst., in accordance therewith it is now ordered that said demurrer be and the same is hereby overruled without prejudice, and the defendants are given thirty days in



which to file and serve their answer in said cause.  
[129]

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*In the Circuit Court of the United States for the  
Ninth Circuit, District of Idaho, Northern Divi-  
sion, Holding Terms at Coeur d'Alene.*

IN EQUITY.

McGOLDRICK LUMBER CO.,

Complainant,

vs.

CHARLES J. KINSOLVING, and JANE DOE  
KINSOLVING (Whose Real Name is Un-  
known), His Wife; MILWAUKEE LUM-  
BER COMPANY, a Corporation; JOHN  
DOE LUNDQUIST (Whose True Name is  
Unknown); and RICHARD ROE LIND-  
QUIST (Whose True Name is Unknown);  
JOHN DOE (Whose True Name is Un-  
known) and RICHARD ROE (Whose True  
Name is Unknown),

Defendants.

**Answer of Defendants, Charles J. Kinsolving, Jane  
Doe Kinsolving, and the Milwaukee Lumber  
Company.**

The answer of the defendants, Charles J. Kinsolving and Jane Doe Kinsolving, his wife, and the Milwaukee Lumber Company, to the Bill of Complaint of the above-named complainant.

In answer to the said bill the defendants, Charles J. Kinsolving and Julia E. Kinsolving (named in the complaint as Jane Doe Kinsolving), husband and

wife, and the Milwaukee Lumber Company, say as follows:

I.

We, and each of us, admit that the above-named complainant McGoldrick Lumber Co., is a corporation organized and existing under and by virtue of the laws of the State of Washington and now is, and during all the times hereinafter mentioned was, a citizen and resident of the State of Washington.

II.

We, and each of us, admit that the above-named defendants, [130] Charles J. Kinsolving and Julia E. Kinsolving, his wife, and each of them, were, and now are, and during all the times in said Bill of Complaint mentioned have been, citizens and residents of the State of Idaho, living and residing at St. Maries, in the county of Kootenai, and State of Idaho, and that the Milwaukee Lumber Company is a corporation organized under and by virtue of the laws of the State of Idaho.

III.

We, and each of us, admit that the subject matter of this suit consists of real estate situated in the county of Shoshone, and State of Idaho, which is hereafter more particularly described, and the value thereof exceeds the sum of Five Thousand (\$5,000.00) Dollars, and the matter here in dispute, exclusive of costs and interest, exceeds the sum of Five Thousand (\$5,000.00) Dollars.

IV.

We, and each of us, admit that, on the 26th day of Sept., 1906, one John Shannon, being then and

there a citizen and resident of the State of Idaho, and a citizen of the United States and of lawful age, made and filed with the Register of the United States Land Office for the District of Idaho, in Coeur d'Alene, Idaho, his written statement, in duplicate, designating by proper legal subdivisions for entry under the laws of the United States for cash purchase of Timber and Stone Lands, being the Act of Congress of June 3, 1878, Chapter 151, 20 Statutes at Large, at page 1889.

The South half of the Northwest quarter (S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ ), the Southwest quarter of the Northeast quarter (SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ ), and the Northeast quarter of the Southwest quarter (NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ ) of Section Nine (9), Township Forty-four (44) North, Range Three (3), East of the Boise Meridian, in Shoshone County, Idaho.

setting forth that the same was unfit for cultivation and valuable chiefly for its timber; that it was uninhabited; that it contained no mining or other improvements, as far as the said applicant knew, nor any valuable deposits of gold, silver, cinnabar, copper or coal; that applicant had made no other application under the said Act and [131] that he did not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he had not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons, whatsoever, by which the title which he should acquire from the Government of the United States should inure, in

whole or in part, to the benefit of any person except himself, which said statement was verified by the oath of the said applicant, John Shannon, on the said day, before the Register of said Land Office at Coeur d'Alene, Idaho, being the district wherein the said land was situated, a copy of which said entry is hereunto attached, marked Exhibit "A" and expressly made a part of complainant's Bill of Complaint, and that the said lands were, at said time and place, unappropriated public lands of the United States, open to appropriation under and by virtue of said Act, and were lands unfit for cultivation and valuable chiefly for timber situated thereon, and were uninhabited and contained no mining or other improvements, and contained no valuable deposits of gold, silver or cinnabar, and these defendants say that the said entryman, John Shannon, did apply to purchase the said lands above, and in complainant's Bill of Complaint, specifically described on speculation, and did not apply to purchase said lands in good faith to appropriate the same to his own exclusive use or benefit, and that prior to the making of said application he, the said John Shannon, had both directly and indirectly, made agreements or contracts with one William McCarter and one Joseph Johnson, and with other persons to these defendants unknown, whereby the title to said lands and premises which he, the said John Shannon, was about to acquire from the United States, by virtue of said application, should inure to the benefit of the said William McCarter and the said Joseph Johnson and to said other persons to these defendants unknown,



and these defendants further say that the said John Shannon did not comply with all the provisions of the [132] Act of Congress in regard to Timber and Stone Lands, being the Act of Congress of June 3, 1878, Chapter 151, 20 Statutes at Large, page 89 and amendments thereof, in that, on the said 26th day of Sept., 1906, when he, the said John Shannon, made application to purchase said land from the Government of the United States, and prior thereto, he, the said John Shannon, made and entered into, both directly and indirectly, divers contracts wherein and whereby the title he was about to acquire to said lands would inure to the benefit of the above-named William McCarter and Joseph Johnson and to other persons whose names are to these defendants unknown, and that, by reason of such contracts, he, the said John Shannon, was not, at said time or place, in all ways qualified, or in any way qualified, to enter the said lands under the said Act.

#### V.

These defendants, and each of them, admit that the Register of the said Land Office duly posted a notice of the application of the said John Shannon for the entry for purchase of the land by legal subdivision in his office for a period of sixty (60) days, and the said applicant, John Shannon, caused a copy thereof to be published for the full period of sixty (60) days in a newspaper published nearest the location of the said premises, and thereafter, and on the 16th day of January, 1907, the said applicant, John Shannon, made his proof before the said Register that, the land was of the character contemplated by

the said Act, uninhabited and without improvements and that it apparently contained no valuable deposits of gold, silver, cinnabar, copper or coal, and thereupon paid unto the said Receiver of the said Land Office the sum of Four Hundred (\$400.00) Dollars, together with the fees of the Register and Receiver, as provided by law, for making the said entry, and thereupon received, from the said Receiver of the United States Land Office at Coeur d'Alene, Idaho, Receiver's Receipt for the said land, numbered "Timber & Stone Entry, No. 2500," and that a copy thereof is attached to the Bill of Complaint, marked [133] Exhibit "B," and these defendants further say that the said John Shannon did not then or there comply, in all ways, or in any way, with the Laws of the United States governing the entry of the said lands under the said Act, and say that the said entry so made by the said John Shannon was not a valid or legal entry or purchase of the said land by the said John Shannon, and further say that the said John Shannon thereupon did not become, and in equity was not, the owner of said land and was not entitled to have issued or delivered to him, the said John Shannon, letters patent under the seal of the United States, conveying unto him, his heirs and assigns, the legal title to said land, in fee simple absolute, for the reason that, prior to the time the said Shannon made application for the purchase of said lands and premises, on the said 26th day of Sept., A. D. 1906, he had made and entered into contracts with one William McCarter and one Joseph Johnson and with other persons whose names

are to these defendants unknown, whereby the title which he, the said John Shannon, was about to acquire in and to said lands from the United States by virtue of said application to purchase was to inure to the benefit of the said William McCarter and the said Joseph Johnson and to said other persons to these defendants unknown, and was not to inure to the sole and exclusive use and benefit of and to the said John Shannon, and these defendants further say that he, the said John Shannon, when he made said application to purchase said lands and premises from the United States, on the said 26th day of Sept., 1906, applied to so purchase the same on speculation and for speculative purposes, and these defendants further say that the said Receiver's Receipt for "Timber & Stone Entry, No. 2500," issued to the said John Shannon for the above-described lands and premises, for the reasons above stated, was procured by fraud upon the part of the said John Shannon, and was wholly and entirely void, and these defendants further say that the complainant herein, at all times from and after the said 26th day of Sept., A. D. 1906, well knew that the [134] said John Shannon had made said application to purchase said lands and premises for speculative purposes, and well knew that the said Receiver's Receipt, numbered "Timber & Stone Entry, No. 2500," was procured by the said John Shannon by fraudulent practices and deceit, and well knew that the same was void, and at all times knew that the said John Shannon acquired no interest in, lien upon or claim to said lands and premises, either at law or in equity, or at

all, and well knew that the said John Shannon was not entitled to a United States Patent of and to said lands and premises, or any part or portion thereof.

## VI.

These defendants admit that the said John Shannon, on or about the 25th day of April, A. D. 1907, signed and acknowledged the deed mentioned and described in complainant's Bill of Complaint, and paragraph VI thereof, and attached to said Bill of Complaint and marked Exhibit "C," and these defendants further say that the said Roy C. Lammers did not purchase the land from the said John Shannon and did not then and there, or at all, pay over or unto the said John Shannon the sum of Eight Thousand (\$8,000.00) Dollars, or any part or portion thereof, and further say that the said Lammers did not then and there, or at all, take title to said lands and premises as trustee for complainant, or at all, and further say that the said Lammers never, at any time, acquired any interest in, lien upon or claim to said land and premises, or any part or portion thereof, by reason of the fraudulent practices of the said John Shannon in procuring said Receiver's Receipt numbered "Timber & Stone Entry, No. 2500," and the knowledge of the complainant thereof, and these defendants further say that the complainant never, at any time, or at all, has been, or now is, in equity, or at all, the owner of the said land or any part or portion thereof, and has not been, nor is it now, entitled to the possession thereof, or any part or portion thereof, and it is not entitled to receive, or be vested with, the legal title,



or any [135] title to the said land by or through a conveyance of the said legal title from the United States of America, by and through its proper officers, to the said John Shannon, and further say that the said John Shannon was never entitled, nor is he now entitled, to a conveyance of the legal title to said land and premises from the United States, or from any other person.

## VII.

These defendants say that the complainant in purchasing the said land from the said John Shannon, was not a *bona fide* purchaser, for value, or at all, and that it, complainant, did not purchase said land without notice of any defect whatsoever in said title and did not, in making said purchase, rely upon the entry of the same and upon the Receiver's Receipt issued to the said John Shannon by the Receiver of the United States Land Office, at Coeur d'Alene, Idaho, on the 16th day of Jan. 1907, and further say that the complainant undertook to purchase said land from the said John Shannon and the said William McCarter and the said Joseph Johnson before any United States patent therefor had ever issued, and while the legal title to the same was in the United States, and with full knowledge of the fraudulent practices of the said John Shannon above set forth, had and done to procure the issuance of said Receiver's Receipt numbered "Timber & Stone Entry, No. 2500," and with full knowledge that prior to the time the said John Shannon had made application to purchase said lands and premises from the United States Government he had entered into con-

tracts and agreements with the said William McCarter and the said Joseph Johnson and other persons, whereby the title he was about to acquire from the United States, and expected to acquire from the United States, in and to said lands and premises, should inure to the benefit of the said William McCarter and the said Joseph Johnson and said other persons, and well knew that he, the said John Shannon, prior to the making of said declaratory statement or entry [136] for said lands and premises on the said 26th day of Sept. 1906, had promised and agreed to convey to the said William McCarter and to the said Joseph Johnson and to said other parties, whose names are unknown to these defendants, an interest in and to said lands and premises, and that he, the said John Shannon, long prior to the said 25th day of April, 1907, and on the 16th day of Jan. 1907, had, pursuant to said agreement, undertaken and attempted to convey said lands and premises to the said Joseph Johnson.

### VIII.

These defendants admit that on the 16th day of July, 1907, the above-named defendant, Charles J. Kinsolving, made and filed in the United States Land Office, at Coeur d'Alene, Idaho, his Affidavit of Contest against the said entry of the said lands by the said John Shannon, in the words and figures set forth in paragraph VIII of complainant's Bill of Complaint, and that thereupon the Register of the said Land Office gave notice, as required by law, that a hearing of said charges would be had at Coeur d'Alene, Idaho, on the 13th day of May, 1908, and

admit that Exhibit "D," attached to complainant's Bill of Complaint, is a substantial copy of said notice, and admit that thereafter, and on the 21st day of May, 1908, in accordance with the said notice, and pursuant to certain stipulations and agreements between the parties interested therein, the parties to the said contest, including the said John Shannon and the said Roy Lammers and the complainant herein, McGoldrick Lumber Co., and the defendant herein, Charles J. Kinsolving, appeared before the Register and Receiver of the said Land Office at Coeur d'Alene, Idaho, and proof was duly introduced in behalf of the said contestant, the defendant herein, Charles J. Kinsolving, and on behalf of the said entryman, John Shannon, and on behalf of the said Roy C. Lammers and the complainant herein, the McGoldrick Lumber Co., as purchaser of said land from said entryman, John Shannon, and that a substantial copy of said proof and of said [137] proceedings is attached to complainant's Bill of Complaint and marked Exhibit "E," and admit that thereafter, and on the — day of —, 1908, the said Register and Receiver of the United States Land Office at Coeur d'Alene, Idaho, filed their written decisions in said Land Office and in said proceedings supporting the Affidavit of Contest of the said defendant, Charles J. Kinsolving, and holding the entry of the said John Shannon for cancellation, and vacating and setting aside said Receiver's Receipt numbered "Timber & Stone Entry, No. 2500," and holding the same for naught, and that exhibit "F," attached to complainant's Bill of Complaint is a sub-

stantial copy of the opinion of the said Register and Receiver upon the said Contest Affidavit of this defendant, Charles J. Kinsolving.

### IX.

These defendants admit that at the beginning of said proceedings before the said Register and Receiver, the complainant demurred to the Affidavit of Contest of this defendant, upon the ground that the statements therein made were insufficient to support the contest or any order with reference to said entry looking to the cancellation thereof, and objected to the said Register and Receiver hearing any proof or taking any testimony in regard thereto upon said grounds, and that said demurrer and Objection said Register and Receiver overruled and permitted the said contestant to introduce testimony in support of said Contest Affidavit, and these defendants say that such testimony was not to the manifest injury of complainant, or against its rights in the premises, and further say that, in overruling the said Demurrer and Objection to the taking of testimony the said Register and Receiver did not commit an error of law to the prejudice of the rights of your orator, and these defendants further say that, on the 16th day of July, 1907, when this defendant, Charles J. Kinsolving, filed said Affidavit of Contest in the United States Land Office at Coeur [138] d'Alene, Idaho, said Affidavit was by the said Register and Receiver forwarded to the Commissioner of the General Land Office of the United States, at the City of Washington, D. C., and thereupon, and pursuant to the course and practice adopted by the Department



of the Interior, in matters pertaining to the sale and disposition of the public lands of the United States, the said Commissioner of the General Land Office, by letter "E," dated Dec. 17, 1907, directed that the contestant be allowed thirty (30) days in which to appear and apply for notice and proceed with said contest, and that the said Register and Receiver caused said letter "E" to be served on the said contestant, the defendant, Charles J. Kinsolving, and application for notice of hearing was duly made by him, and that on Feb. 22, 1908, notice of hearing was issued by said Register and Receiver of said Coeur d'Alene Land Office and served upon the parties to said contest, citing them to appear at said local land office in the City of Coeur d'Alene, on the 13th day of May, 1908, to submit testimony touching the allegations of the said Contest Affidavit, and that thereafter, and on May 21, 1908, all parties to said contest appeared at said Land Office and submitted evidence and testimony, *pro* and *con*, upon the allegations of said contest affidavit, and that, in the premises, it was the legal duty of the said Register and Receiver to hear and record such testimony, and that such Register and Receiver had no jurisdiction, power of authority to sustain any Demurrer or Motion or other proceedings directed at or to the legal sufficiency of said Affidavit of Contest.

#### X.

These defendants admit that at said hearing the contestant, the said defendant, Charles J. Kinsolving, offered in evidence a certified copy of a contract between the entryman, John Shannon, and William

McCarter, and that said contract is attached to the evidence taken before said Register and Receiver, attached to complainant's [139] Bill of Complaint, marked exhibit "A," for identification to said testimony, and admit that the complainant objected to the introduction of the same upon the ground set forth in said copy of said proof attached to the Bill of Complaint as exhibit "E," and that the said Register and Receiver sustained complainant's said objection thereto and refused to admit the same, and these defendants say that in making and rendering said decision said Register and Receiver did not treat or consider said contract between the said Shannon and said McCarter as if the same had been admitted in evidence at said hearing, or at all, and say that the said Register and Receiver did not utterly or totally ignore the fact and did not ignore the fact that said pretended contract had, when offered in evidence, been rejected, and further say that the said Register and Receiver did not consider or treat said contract as if admitted in evidence, and further say that said Register and Receiver did not err in law in their said decision or in their consideration of the testimony submitted upon said contest to the prejudice of the rights of complainant, or at all, except that the ruling of the Register and Receiver in rejecting said Exhibit "A," proffered in said hearing upon said Contest Affidavit by this defendant, Charles J. Kinsolving, was manifest error and prejudicial to the rights of this defendant, Charles J. Kinsolving, in the premises, and further say that by said exhibit "A" so rejected by said Register and

Receiver of the said United States Land Office, at Coeur d'Alene, Idaho, when offered in evidence by said contestant and this defendant, Charles J. Kinsolving, he, the said Charles J. Kinsolving was able to prove, and that said exhibit "A," when exhibited in court, will prove, that on the 24th day of Sept., 1906, and two days before the said John Shannon made application for the purchase of said lands and premises in said agreement in complainant's Bill of Complaint and in "Timber & Stone Entry, No. [140] 2500," he, the said John Shannon, for and in consideration of the sum of One Thousand (\$1,000.00) Dollars, had promised and agreed, in writing, to convey, to the said William McCarter, party of the first part in said Exhibit "A," and undivided one-half interest in and to said lands and premises, and the whole thereof, and that when, on the 26th day of Sept., A. D. 1906, the said John Shannon made application to purchase said lands and premises from the United States Government, under and pursuant to the terms and provisions of the Act of Congress approved June 3, 1878, he, the said John Shannon, had directly made an agreement with the said William McCarter by which the title which he, the said John Shannon, should acquire from the Government of the United States should inure, in part, to the benefit of the said William McCarter, and that when he, the said John Shannon, on the said 26th day of Sept., A. D. 1906, made application to so purchase said lands and premises from the Government of the United States he applied to purchase the same, and the whole thereof, on speculation

and not in good faith to appropriate it to his own exclusive use and benefit, and that he, the said John Shannon, then and there perpetrated a fraud upon the Government of the United States and undertook to wrongfully, unlawfully and fraudulently procure the title to said lands and premises from the United States, all of which was at all times well known to the said Roy C. Lammers and to the officers and managers of the complainant, and complainant as well.

These answering defendants further admit that, at the conclusion of the testimony of the said contestant, Charles J. Kinsolving, given before the Register and Receiver, and after the said contestant had rested his case, the complainant moved the said Register and Receiver to dismiss the said contest for the reason that there had been no evidence introduced that would, in any way, affect the entry made by said entryman, John Shannon, on the said lands, and that the said evidence of the said contestant clearly showed that the said John Shannon acted, at all times, within his [141] rights, and had made no contract or agreement to convey any part of the interest in the said land, and also that said evidence was wholly insufficient to justify any findings of fraud on the part of the said entryman, John Shannon, or to justify the cancellation of the said entry, and that the said Register and Receiver overruled the said motion to dismiss, and these defendants say that the said Register and Receiver had no right, no jurisdiction and no authority of law or practice to sustain said motion, and further say that, under the



rules and practice of the Department of the Interior, respecting and relating to the sale and disposition of the public lands of the United States, it was the legal duty of said Register and Receiver to hear and consider all evidence offered in support of said Contest Affidavit, and consider and determine the rights of the respective parties to said Contest upon the merits according to the said evidence before them, and these defendants say that the refusal of the Register and Receiver to sustain said motion and to dismiss said Contest proceedings did not err in law to the prejudice of the rights of the complainant, or at all, and these defendants admit that, at the conclusion of all the testimony before the said Register and Receiver, the complainant repeated its motion to dismiss the said proceedings upon the said grounds, and admit that the Register and Receiver overruled the same and refused to dismiss the same, and these defendants say that the said Register and Receiver, in overruling said motion, and in refusing to dismiss said proceedings, did not err in law to the prejudice of the rights of the complainant, or at all, and these defendants further say that the said Register and Receiver, in making and rendering their said decision, did not wrongfully or unlawfully, or in any way, ignore the evidence adduced at said hearing, and did not, without any testimony whatever to support such finding, find that said entry was made for speculative purposes and [142] not for the sole and exclusive benefit of the said application, and further say that, in truth and in fact, there is an abundance of evidence preponderating in support

and in justification of the findings of said Register and Receiver that when the said John Shannon made application to purchase said lands and premises from the United States he did not make such application in good faith, and that he made said entry for the use and benefit of others than himself, and not for his sole and exclusive use and benefit, and these defendants further say that the said Register and Receiver, in making said finding, and in rendering said decision and judgment upon the matters of said Contest did not misconstrue or misinterpret the law applicable to such case, in any manner or form, and further say that said Register and Receiver did not fail or refuse to hold that, as a matter of law, the contestant was bound to show, by evidence, that such entry was made for speculative purposes and not for the sole and exclusive use and benefit of the said entryman, John Shannon, and further say that said Register and Receiver did not hold, as a matter of law, that they were authorized and empowered to, and had jurisdiction to, find that such entry was made for speculative purposes and not for the sole and exclusive use and benefit of said Shannon without evidence to support such finding or upon ungrounded suspicions existing solely in their own minds, but that such Register and Receiver did hold, as will fully appear when said decision is exhibited to this court, that there was no direct evidence showing that an agreement between Shannon and anyone else, prior to the filing of his timber application, or even prior to the submitting of his proof, had been entered into to convey all, or any portion, of the land,

or to give anyone any interest therein, but, in the light of his subsequent actions, or acts, we are inclined to the belief that there was such an understanding, and that his conveyance of the land immediately [143] after proof was pursuant to such an agreement, and we think the record will sustain the view that the entry was made for speculative purposes and not for the sole and exclusive benefit of the applicant, and for this reason we recommend that the entry be cancelled, and these defendants further say that when the entire record of the proceedings in the Department of the Interior respecting the contest of the said entry of the said John Shannon, by this defendant, Charles J. Kinsolving, is exhibited to the Court, such evidence will conclusively show that the said John Shannon made application to purchase said lands and premises from the Government of the United States for speculative purposes and that such fact was, at all times, known to the complainant.

And these defendants further say that the said Register and Receiver did not make their said decision under or upon a misconstruction of the law or that they were induced, by any misconstruction of the law, to make said decision, and that said Register and Receiver, in rendering and making said decision first found the facts as disclosed by the testimony adduced upon said Contest, and clearly and correctly applied the law thereto, and that the findings of fact made by said Register and Receiver are abundantly supported by the evidence submitted before them upon said Contest, as an exhibition of said evidence will fully show, and that the Register

and Receiver made proper application of the law to the facts so found by them.

### XI.

These defendants admit that within the time provided by law the complainant appealed from the decision of the said Register and Receiver of the United States Land Office, at Coeur d'Alene, Idaho, to the Commissioner of the General Land Office and that thereafter, and on the 29th day of May, 1909, the Commissioner of the said General Land Office affirmed the decision of the Register and Receiver of the United States Land Office at Coeur d'Alene, [144] Idaho, a copy of which said decision affirming the same is attached to complainant's Bill of Complaint and marked Exhibit "G."

### XII.

These defendants say that the Commissioner of the General Land Office in making and rendering his said decision did not consider the contract between the said Shannon and said McCarter as if the same had been admitted in evidence at said hearing, and that he, the said Commissioner, was not influenced therein by the decision of the Register and Receiver of the Local Land Office, and that he did not, utterly and totally, or at all, ignore the fact that said contract had, when offered in evidence, been rejected and further say that the said Commissioner of the General Land Office did not consider said contract as admitted in evidence and did not err in law to the prejudice of the rights of complainant, or at all, and these defendants further say that the said Commissioner of the General Land Office, in making and ren-



dering said decision, did not ignore the evidence adduced at said hearing, and did not, without any testimony whatsoever to support such finding, find that said entry was made for speculative purposes and not for the sole and exclusive benefit of said applicant, but say that the said Commissioner did find that said entry of the said John Shannon was made for speculative purposes and was not made for the sole and exclusive use and benefit of said applicant, John Shannon, and that said finding was based upon the evidence adduced at the hearing of said Contest, and further say that there is an abundance and a preponderance of evidence to support and justify such finding, and to support and justify the finding that the said entry, when made by the said John Shannon, on Sept. 26, 1906, was made for speculative purposes and was not made for his sole and exclusive use and benefit, and these defendants further say that the said Commissioner of the General Land Office, in making his said findings and decision affirming the decision of the Register and Receiver of [145] the United States Land Office at Coeur d'Alene did not misinterpret the law applicable to said case, or to said Contest, or to the facts found therein from the evidence, and further say that the said Register and Receiver did hold, as a matter of law, that the contestant was bound to show, by evidence, that such entry was made for speculative purposes and not for the sole and exclusive use and benefit of the said entryman, Shannon, and further say that the said Commissioner of the General Land Office did not hold that he, as a matter of law, was

authorized and empowered to, and had jurisdiction to, find that said entry was made for speculative purposes and not for the sole use and benefit of said Shannon totally without evidence to support such finding, and upon ungrounded suspicion existing solely in his own mind and not the minds of the Register and Receiver in the Local Land Office, but that said Commissioner of the General Land Office did hold that there was sufficient evidence adduced at said hearing to establish the fact that when the said entryman, John Shannon, made entry to purchase said lands and premises on the said 26th day of Sept., A. D. 1906, he made such application for speculative purposes and not for his exclusive use and benefit, and these defendants say that the said Commissioner of the General Land Office made no error, or no misconstruction of the law, and that by no error or misconstruction of the law was the said Commissioner induced to, or did, make or render his decision affirming the decision of the Local Land Office, and further say that the decision of the said Commissioner of the General Land Office is supported by the evidence adduced in said Contest, and that the said Commissioner made proper application of the law to the facts established by, and deducible from, the said evidence, and further say that to have reversed the decision of the said Register and Receiver of the said Land Office at the city of Coeur d'Alene, and to have ordered letters patent conveying the legal title to the said land to said Shannon, and thereby [146] vesting the said legal title to said premises in complainant, would have been gross error and would have been

contrary to the evidence adduced upon said contest hearing, and contrary to the law applicable thereto.

### XIII.

These defendants admit that after the decision of the said Commissioner of the General Land Office, and within the time fixed by law, complainant appealed from the decision of the Commissioner of the General Land Office to the Secretary of the Interior, and thereafter, and on the 10th day of May, 1910, the Secretary of the Interior filed his decision, affirming the decision of the Commissioner of the General Land Office and of the Register and Receiver of the United States Land Office at Coeur d'Alene, Idaho, and that exhibit "H," attached to the Bill of Complaint, is a substantial copy of said decision.

### XIV.

And these defendants say that the Secretary of the Interior, in making and rendering his decision, did not treat and consider the said contract between the said Shannon and said McCarter as if the same had been admitted in evidence at said hearing, and was not influenced therein by the decision of the Register and Receiver of the Local Land Office and did not ignore the fact that said contract, when offered in evidence, had been rejected, and did not consider or treat said contract as if admitted in evidence, and did not err in law, to the prejudice of the rights of the complainant, or at all, and these defendants further say that the said Secretary of the Interior, in making and rendering said decision, did not ignore the evidence adduced at said hearing, and did not make the same without any testimony to support his

finding, and further say that said Secretary of the Interior, in making and rendering his said decision, did find that said entry was made for speculative purposes and not for the sole and [147] exclusive use and benefit of the applicant, John Shannon, and that such decision was based upon an abundance of evidence in support thereof, and that there was a preponderance of evidence adduced at the hearing upon said Contest to support and justify the finding that the said entry, when made by the said John Shannon, on the 26th day of Sept. 1906, was made otherwise than for his sole and exclusive use and benefit, and further say that the said Secretary of the Interior in making said finding, did not misconstrue or misinterpret the law applicable to said Contest and that said Register and Receiver did hold that, as a matter of law, the contestant was bound to show, by evidence, that such entry was made for speculative purposes and not for the sole and exclusive use and benefit of the said Shannon, and these defendants further say that the said Secretary of the Interior did not hold, as a matter of law, or otherwise, that he was authorized or empowered to, or had jurisdiction to, find that said entry was made for speculative purposes and not for the sole use and benefit of the said Shannon without evidence to support such finding, or upon ungrounded suspicion existing solely in his own mind and not the minds of the Register and Receiver in the Local Land Office, and these defendants say that the said Secretary of the Interior, in rendering said decision affirming the decision of the Commissioner of the General Land



Office based the same upon the evidence adduced upon the hearing of said Contest, and that without, and in addition to, the said written contract or agreement made and entered into on the 24th day of Sept. 1906, between the said William McCarter and the said entryman, John Shannon, there was a preponderance of evidence in support of the findings of the Register and Receiver and the Commissioner of the General Land Office and the Secretary of the Interior that the said entryman, John Shannon, when he made application to purchase said lands and premises of the United States, on the 26th day of Sept., A. D. 1906, [148] made such application for speculative purposes and not for his own exclusive use and benefit, and these defendants further say that the said Secretary of the Interior was not induced to, and did not, make or render his decision affirming the decision of the Commissioner of the General Land Office and the Local Land Office upon errors or misconstruction of the law, and further say that, had the Secretary of the Interior reversed the decision of the Commissioner of the General Land Office and the decision of the Register and Receiver of the Local Land Office and directed the issuance of patent to the said John Shannon, and thereby have vested complainant with the legal title to the said lands and premises, such action would have been contrary to the evidence, and in violation of the law applicable thereto.

#### XV.

And these defendants further say that on the 25th day of Oct. 1910, the said defendant, Charles J. Kinsolving, as attorney in fact for the Santa Fe Pacific

Railroad Company, a corporation, organized under an Act of Congress approved March 3, 1897, and for the said Santa Fe Pacific Railroad Company, a corporation, made selection of the above described lands and premises, and the whole thereof, under and by virtue of lieu land scrip, in accordance with the Act of Congress of June 4, 1897, and June 6, 1900, and received therefor Receiver's Receipt covering the said lands and premises, and thereafter, and on the 27th day of March, 1911, the United States, by and through its legally constituted officers, pursuant to said application and proof made, made and caused to be delivered to the said Santa Fe Pacific Railroad Company, a patent, conveying the title of the United States in and to

The South half of the Northwest Quarter (S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ ) and the Southwest quarter of the Northeast quarter (SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ ) and the Northeast quarter of the Southwest quarter (NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ ) of Section Nine (9), in Township Forty-four (44) North of Range Three (3), E. B. M., in Idaho, containing 160 acres,

the same being the lands and premises in complainant's Bill of [149] Complaint and in this Answer above mentioned and described, and that thereafter, and on the 15th day of Sept., A. D. 1911, and long prior to the commencement of this suit by complainant, the said Santa Fe Pacific Railroad Company, a corporation, for a valuable consideration, to wit, the sum of Twelve Thousand (\$12,000.00) Dollars, sold, assigned and transferred the said lands and premises and the whole thereof, to the defendant

herein, the Milwaukee Lumber Company, a corporation, and these defendants further say that the said Charles J. Kinsolving and Julia E. Kinsolving, his wife, have never, at any time, held, nor do they now hold, the legal title to the said lands and premises, or any part or portion thereof, and further say that never, at any time, has any patent from the United States, or any instrument from the United States, conveying the legal title, or any title, to said lands and premises to these defendants, or either or any of them, been issued by the United States, or otherwise.

## XVI.

These defendants further say that the Register and Receiver of the United States Land Office at Coeur d'Alene, Idaho, did not err in holding that the said "Timber and Stone Entry, No. 2500," made by the said John Shannon for the land in controversy in the Contest filed by the defendant, Charles J. Kinsolving, was made for speculative purposes and not for the sole and exclusive use and benefit of the said John Shannon, and did not err in holding said entry for cancellation, and further say that the Commissioner of the General Land Office and the Honorable Secretary of the Interior did not err in affirming the decision of the said Register and Receiver, and in holding that said entry No. 2500 should be cancelled, and further say that no act of the said officers, or either of them, in regard to the same, was, or is, against the laws of the United States, and further say that the decisions of said officers, in all matters respecting said Contest, were in [150] accordance

with a preponderance of the evidence adduced upon said Contest, and in compliance with the law applicable thereto, and that should said officers, or either or any of them, have decided in favor of the entryman, John Shannon, and in support of the title of the complainant, such decision would have been contrary to the evidence and against the law.

### XVI<sup>1</sup>/<sub>2</sub>.

These defendants admit that the Milwaukee Lumber Company claims an interest in said property, and claims to be the owner thereof, in fee simple, except that it, the said Milwaukee Lumber Company, on the 25th day of Sept., A. D. 1911, entered into an agreement in writing wherein and whereby it premised and agreed, upon certain terms and conditions in said agreement contained, to sell and convey said lands and premises to the defendants, Richard Roe Lindquist, whose true name is Elix Lindquist, and John Doe Lundquist, whose real name is Lyn Lundquist.

### XVII.

And these defendants further say that, on the 15th day of Sept. 1911, the said corporation, Santa Fe Pacific Railroad Company, acting by and through its said attorney in fact, Charles J. Kinsolving, for a valuable consideration, to wit, the sum of Twelve Thousand (\$12,000.00) Dollars, and in due course of business sold, transferred and conveyed, by quitclaim deed, the above mentioned and described property to the defendant, the Milwaukee Lumber Company, and that said deed was recorded in the County of Shoshone and State of Idaho, in Book 42, on page



149, of the records of said County of Shoshone, on the 24th day of Sept. 1911, and that the said defendant, Milwaukee Lumber Company, on the said 15th day of Sept. 1911, became the owner, in fee simple, of said lands and premises, and each and every part thereof, for a valuable consideration, in good faith, and in the due course of business, and these defendants further say that the said transfer was made upon a [151] valid, legal and valuable consideration, to wit, the sum of Twelve Thousand (\$12,000.00) Dollars, and was not made in fraud of any rights of the complainant in the premises, and was not made by or through a conspiracy or any conspiracy, entered into by the said defendants, Charles J. Kinsolving and the said Milwaukee Lumber Company, or any conspiracy at all, and that such sale and conveyance was not made in an effort to defeat the rights of complainant in the premises, or any rights of the complainant at all.

#### XVIII.

These defendants admit that the above-described land has thereon a large amount of white pine and other timber, suitable for the purpose of manufacturing into logs, and is valuable solely for its said timber, and that the present value of said premises would be largely destroyed if the said timber should be cut and removed therefrom.

#### XIX.

These defendants say that the said defendants, Charles J. Kinsolving and the said Milwaukee Lumber Company, or either of them, did not, on or about the first day of Oct. 1911, or at any other time, or at

all, enter upon the said lands and premises through any conspiracy to defeat the rights of complainant, or at all, through his or their agents or contractors, servants and employees, or at all, or the said Elix Lindquist and said Lyn Lundquist, and commence to cut or remove the timber, or any part or portion thereof, from the said land, or to log the same for the purpose of converting the said timber into lumber or destroying the value of said land so far as the complainant is concerned, or at all, and further say that they never have been, or are they now, engaged in cutting or removing the timber from the said land, or in logging the same for the purpose of manufacturing the same into lumber, and say that they never had threatened to so cut or remove the timber from the said [152] land or to log the same.

## XX.

And these defendants admit that the defendant, Charles J. Kinsolving, is a man of small means but say that he, the said defendant, Charles J. Kinsolving, is not mainly interested in said lands and premises under his agreement, or any agreement, with the Milwaukee Lumber Company, and say that he is not the owner of the said lands and premises, or any part or portion thereof, and further say that he is not interested in said lands and premises in any way, manner, shape or form.

## XXI.

And these defendants further say that nothing done in the premises by these defendants concerning or respecting the said lands and premises are contrary to equity or good conscience or tend to

the manifest wrong, injury or oppression of complainant in the premises, and further say that each and every thing had and done in the premises by these defendants, or either or any of them, was so done within the legal rights of these defendants, and each of them.

## XXII.

These defendants further say that heretofore, and on or about the 17th day of July, 1905, the John Shannon mentioned and described in complainant's Bill of Complaint made homestead entry for

The South half of the Northwest Quarter (S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ ) the Northeast Quarter of the Southwest Quarter (NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ ) and the Southwest Quarter of the Northeast Quarter (SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ ) of Section Nine (9), Township Forty-four (44) North of Range Three (3), East, Boise Meridian;

and that the said lands and premises are the same and identical lands and premises in complainant's Bill of Complaint and in the Answer of these defendants hereinbefore and hereinafter mentioned and described, and that thereafter the said John Shannon made application to offer final proof on said homestead as a commutation cash entry, which application was duly and regularly published and that on the 26th day of September, 1906, was the day set for such final proof. That on the 24th day of Sept., A. D. 1906, the said [153] John Shannon made and executed an agreement with one William McCarter, in the following words and figures, to wit:

“This agreement made and entered into this

24th day of September, 1906, by and between John Shannon, of Kootenai County, State of Idaho, party of the first part, and William McCarter, of Kootenai County, State of Idaho, party of the second part.

WITNESSETH, that the said party of the first part for and in consideration of the sum of one thousand dollars to him in hand paid, the receipt whereof is hereby acknowledged and other valuable considerations, hereby agrees and binds himself, to convey to the said party of the second part, an undivided one half interest in and to the S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  and SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  of Sec. 9, Twp. 44 N., R. 3 E., B. M., by good and sufficient warranty deed, as soon as he, the said party of the first part, makes final homestead proof of the said lands and premises and receives his receiver's final receipt therefor.

IN WITNESS WHEREOF, said party of the first part has hereunto set his hand and seal the day and year first above written.

JOHN SHANNON. (Seal)

That the said John Shannon duly acknowledged the execution of said agreement on the said 24th day of Sept., A. D. 1906, before Edward P. Brennan, a Notary Public in and for Kootenai County, State of Idaho, so as to entitle the said contract to be recorded, and that thereafter, and on the 21st day of January, 1907, at the hour of 9 o'clock A. M., the said instrument was duly recorded in Book "E" of Agreements, at page 589 of the Records of Shoshone



County, State of Idaho.

That the said John Shannon did not make, or failed to make, proof under said commuted homestead entry, and, on the 26th day of Sept. 1906, made application to purchase said lands and premises from the United State pursuant to the Act approved June 3, 1878, generally known as the "Timber and Stone Act," and made and filed, with the Register of the United States Land Office at the City of Coeur d'Alene, Idaho, the requisite declaratory statement therefor, and that when he, the said John Shannon, made and filed said declaratory statement and made application to purchase said lands and premises pursuant to said Timber and Stone Act the said written agreements above referred to was then in full force and effect, and [154] that prior to the time the said John Shannon filed said declaratory statement and made application to purchase said lands and premises, on the said 26th day of Sept., A. D. 1906, the exact date of which is unknown to these defendants, the said John Shannon had made and entered into an agreement with one Joseph Johnson, whereby the title to said lands and premises which he, the said John Shannon, was to acquire, and expected to acquire, from the United States, under and by virtue of said application and said declaratory statement and the provisions of said Timber and Stone Act, was to inure to the said Joseph Johnson and to said other persons whose names are to these defendants unknown, and that when the said John Shannon so made said application to purchase said lands and premises and so filed

said declaratory statement therefor, he, the said John Shannon, made said application for speculative purposes and not for his sole use and benefit and made the same contrary to the provisions of said Act of Congress of June 3, 1878, generally known as the "Timber and Stone Act."

And these defendants further say that thereafter such proceedings were had and done on the said application of the said John Shannon to purchase said lands and premises that on the 16th day of January, 1907, he submitted proof upon said declaratory statement, and wrongfully and unlawfully procured the Register of the said United States Land Office, at Coeur d'Alene, Idaho, to accept and receive from him, the said John Shannon, the purchase price of said lands and premises and to issue to him, the said John Shannon, "Timber & Stone Entry, No. 2500," and that on the 16th day of January, A. D., 1907, and immediately following the issuance of said Receiver's Receipt numbered "Timber & Stone Entry, No. 2500," and before patent had issued conveying the title to said lands and premises to the said John Shannon, and pursuant to the agreement between the said John Shannon and the said Joseph Johnson, whereby the [155] title to said lands and premises which he, the said John Shannon, expected to acquire, and undertook to acquire, from the United States, was to inure to the benefit of the said Joseph Johnson, he, the said John Shannon made, executed and delivered to the said Joseph Johnson a good and sufficient deed of conveyance, conveying said lands and premises, and the whole

thereof, to him, the said Joseph Johnson.

### XXIII.

And these defendants further say that thereafter, and on or about April 25, 1907, and prior to the issuance of any patent conveying the title of the United States in and to said lands and premises to the said John Shannon, or to any other person, the said John Shannon and the said Joseph Johnson, and each of them, made, executed, acknowledged and delivered to one Roy C. Lammers a good and sufficient deed of conveyance of and to said lands and premises, and each and every part and parcel thereof, and that thereafter, and on or about August 7, 1907, said deeds, and each of them, were recorded in the office of the Recorder of Shoshone County, State of Idaho, and these defendants further allege that they are informed, from an examination of complainant's Bill of Complaint, and believe, and upon such information and belief say that the said Roy C. Lammers, in accepting said deeds of conveyance of and to said lands and premises, was acting as the agent of the complainant, and claimed and pretended to take the title to said lands and premises in trust for complainant, and that thereafter, and about the month of May, A. D. 1907, transferred and conveyed said lands and premises to the said complainant.

### XXIV.

And these defendants further say that at all times from the said 26th day of Sept. 1906, up to and until the said Roy C. Lammers made and executed said deed of conveyance of and to said lands and premises to the complainant herein, the said Roy C. Lam-

mers was the employed agent of the complainant and was authorized [156] and empowered to make purchases of timber lands for and on behalf of said complainant and that during said periods of time he, the said Roy C. Lammers, and the said complainant well knew that the said John Shannon made application to purchase said lands and premises on the said 26th day of Sept., A. D. 1906, for speculative purposes and not for his exclusive use and benefit, and well knew that he, the said John Shannon, prior to making said application to purchase said lands and premises had made and entered into said written agreement, whereby the title which he, the said Shannon, intended to, and expected to, acquire from the United States should inure to the benefit of him, the said William McCarter, and also during the same periods of time he, the said Roy C. Lammers well knew that, prior to the said 26th day of Sept. 1906, he, the said John Shannon, had made and entered into said agreement with the said Joseph Johnson, whereby the title to said lands and premises which he, the said Shannon, intended to, and expected to, acquire from the United States should inure to the benefit of the said Joseph Johnson, and also he, the said Roy C. Lammers, and the said complainant well knew that he, the said John Shannon, wrongfully, unlawfully and fraudulently procured the Receiver of the said United States Land Office at Coeur d'Alene, Idaho, to issue said Receiver's Receipt numbered "Timber & Stone Entry, No. 2500," and well knew that said "Timber & Stone Entry, No. 2500" was void, and well knew that no patent con-



veying the title of the United States to said lands and premises to the said John Shannon had been issued thereon.

## XXV.

And these defendants further say that on or about the 16th day of July, 1907, the above named defendant, Charles J. Kinsolving, filed in the said United States Land Office at Coeur d'Alene, Idaho, his Affidavit of Contest against the said entry of the said lands by the said John Shannon, and that [157] thereafter such proceedings were had and done upon said Affidavit of Contest that on the 21st day of May, 1908, said Contest was brought for hearing. That the contestant, this defendant, Charles J. Kinsolving, the said John Shannon, the entryman, and the complainant herein were all present at said hearing and submitted evidence, *pro* and *con*, upon the issues raised by said Contest Affidavit, and thereafter the said Register and Receiver made and rendered their decision therein, holding said entry of the said John Shannon for cancellation, on the ground that the said Shannon made application to purchase said lands and premises from the United States for speculative purposes *and for* his exclusive use and benefit. That thereafter such proceedings were had and done in said Contest that the complainant appealed from the said decision of the Register and Receiver of said Local Land Office to the Commissioner of the General Land Office and thereafter the said Commissioner of the General Land Office rendered his decision in said matter, affirming the decision of the Register and Receiver, holding the entry of said

John Shannon for cancellation, and thereafter the complainant appealed from the decision of said Commissioner of the General Land Office to the Secretary of the Interior, and thereupon such proceedings were had and done that the Secretary of the Interior affirmed said decision of the Commissioner of the General Land Office and the decision of the Register and Receiver of the Local Land Office, and held the entry of the said John Shannon for cancellation, and that the said entry of the said John Shannon was cancelled and held for naught, and that no United States patent, conveying the said lands and premises to the said John Shannon, was ever issued. That the said Department of the Interior, acting by and through its proper officers, to wit, the Register and Receiver of the United States Land Office at Coeur d'Alene, Idaho, the Commissioner of the General Land Office and the Secretary of the Interior, had jurisdiction and authority to hear said Contest and to determine the rights of the complainant herein, [158] the said Roy C. Lammers and the said John Shannon, in and to said lands and premises, and each and every part and parcel thereof, acquired by, or claimed by, or under the application of the said John Shannon to purchase the same from the United States and the said Receiver's Receipt "Timber & Stone Entry No. 2500," and did so determine such rights of the complainant and the said Roy C. Lammers and the said John Shannon, upon the testimony adduced at said Contest hearing, and under the law applicable to the issues raised thereby, and these defendants say that all right, or manner of

right, of the complainant in and to the lands and premises in the Bill of Complaint mentioned and described, by reason of any claim, or pretence of claim, set forth in said Bill of Complaint, have been fairly, fully and completely litigated before the Department of the Interior of the United States having jurisdiction to sell and dispose of the unappropriated Government lands of the United States, upon issues properly raised, and have been determined adversely to the complainant, as these defendants will be able to show and prove by the records and files of the said United States Land Office at Coeur d'Alene, Idaho, and the records of the office of the Commissioner of the General Land Office and the records of the office of the Secretary of the Interior.

#### XXVI.

And this defendant, Milwaukee Lumber Company, says that it is a corporation engaged in the manufacture of lumber and operating extensive sawmills at St. Maries, in Kootenai County, Idaho, and that, in carrying on its said business of manufacturing lumber, it is necessary to purchase large quantities of logs and standing timber, and that to procure standing timber it is also frequently necessary to purchase the land upon which said timber is standing and growing, and that the purchase of said lands and said standing timber is a part of the business of this defendant incidental [159] to its business of manufacturing lumber.

#### XXVII.

And this defendant further says that, on or about, or shortly before, the 15th day of Sept. 1911, it be-

gan negotiations with the defendant, Charles J. Kinsolving, for the purchase of

The South half of the Northwest quarter (S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ ) the Southwest quarter of the Northeast quarter (SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ ) and the Northeast quarter of the Southwest quarter (NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ ) of Section Nine (9), Township Forty-four (44) North, of Range Three (3), East of the Boise Meridian, containing 160 acres,

and that the said Charles J. Kinsolving exhibited to the officers and agents of this defendant a United States patent issued on the 27th day of March, A. D. 1911, conveying said lands and premises, and the whole thereof, to the Santa Fe Pacific Railroad Company, a corporation, in lieu of land belonging to the said Santa Fe Pacific Railroad Company situated and included within the limits of a public forest reservation known and officially designated as the "San Francisco Mountains Forest Reserve, Arizona," a true and correct copy of which patent is hereunto attached, marked Exhibit "A," and this defendant asks that the same be considered as a part of its Answer. That at the same time and place the said defendant, Charles J. Kinsolving, exhibited to the officers and agents of this defendant corporation two Powers of Attorney, executed by the said Santa Fe Pacific Railroad Company, whereby said Santa Fe Pacific Railroad Company did appoint the said Charles J. Kinsolving its attorney in fact to convey the above mentioned and described lands, copies of which said Powers of Attorney are hereunto an-



nexed, marked respectively, "B" and "B1," and this defendant asks that the said be read and considered as a part of this Answer.

### XXVIII.

And this defendant further says that its officers, authorized and empowered to make purchase of logs, standing timber and timber lands for it in the usual course of its business, relying [160] upon said patent and said Powers of Attorney, believed that the said lands and premises belonged to the said Santa Fe Pacific Railroad Company, and that this defendant, Charles J. Kinsolving, was duly authorized and empowered to transfer and convey the same as attorney in fact for said Santa Fe Pacific Railroad Company, and that it then and there purchased said lands and premises for the sum of Twelve Thousand (\$12,000.00) Dollars, from the said Santa Fe Pacific Railroad Company, and that the said Santa Fe Pacific Railroad Company, acting by and through its said attorney in fact, did make, execute and acknowledge a deed of conveyance, whereby it did convey said lands and premises to this defendant, a true and correct copy of which deed is hereunto attached, marked Exhibit "C," and this defendant asks that the same be read and considered as a part of this Answer, and that this defendant then and there paid to the said Charles J. Kinsolving, for the use and benefit of the said Santa Fe Pacific Railroad Company, the purchase price of said lands and premises, to wit, the sum of Twelve Thousand (\$12,000.00) Dollars, and that thereafter this defendant, for the purpose of acquiring the standing

timber and sawlogs situated upon said lands and premises, for the purpose of manufacturing the same into lumber, made and entered into an agreement with the defendants, Elix Lindquist and Lyn Lundquist, whereby it promised and agreed to sell said lands to the said Lindquist and Lundquist, in consideration of the said Lindquist and Lundquist cutting said standing timber into sawlogs and delivering the same to this defendant, at an agreed price per thousand, a copy of which said contract or agreement, is hereunto attached, marked Exhibit "D," and this defendant asks that the same be read and considered as a part of this Answer, and this defendant further says, that excepting the rights of the said Elix Lindquist and Lyn Lundquist under and by virtue of said contract or agreement, it is now the owner and holder of said lands and premises, and each and every part and parcel [161] thereof.

### XXIX.

And this defendant further says that in all negotiations for the purchase of said lands and premises, and in all transactions connected with or concerning the purchase thereof, by this defendant, and the conveyance thereof to this defendant, this defendant acted in good faith, in the ordinary course of business, and acted without any knowledge that the complainant had, or claimed to have, any interest in, or any lien upon, or any claim to, said lands and premises, or any part or portion thereof, and accepted said deed of conveyance, and paid the purchase price of said lands and premises, and the consideration of said deed, to wit, Twelve Thousand

(§12,000.00) Dollars, in good faith, believing that it was obtaining the title to said lands and premises, free and clear of any claim of any kind or nature, or any person whomsoever, and without any knowledge that the complainant had any claim, or made any claim, of any kind or nature whatsoever, of, to or in said premises, or any part or portion thereof.

WHEREFORE, these defendants pray judgment and decree of this court that all claims of the complainant of any claim to, interest in, and lien upon, the said lands and premises in complainant's Bill of Complaint and herein described, be held for naught and that this defendant, the Milwaukee Lumber Company, a corporation, be decreed to be the owner of said lands and premises as against any and all claims, or pretences of claims, of the complainant therein or thereto, and for such other and further relief as to this court seems meet and proper in the premises.

R. B. MORRIS,

J. H. FORNEY,

FRANK L. MOORE,

Counselors for these Answering Defendants. [162]

**Exhibit "A" [to Answer to Defendant Charles J. Kinsolving et ux. et al.].**

COEUR D'ALENE 06636.

THE UNITED STATES OF AMERICA.  
TO ALL TO WHOM THESE PRESENTS  
SHALL COME, GREETING:

WHEREAS, the Santa Fe Pacific Railroad Company, being the owner of a tract of land situated and

included within the limits of a public forest reservation, known and officially designated as the San Francisco Mountains Forest Reserve, Arizona, has, under the provisions of the act approved June 4, 1897, entitled "An Act making appropriations for sundry civil expenses of the Government for the Fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes," reconveyed and relinquished the said tract to the United States and has, under the provisions of said Act, selected in lieu thereof the following described tract of vacant public land now open to settlement, to wit:

The south half of the northwest quarter, the southwest quarter of the northeast quarter, and the northeast quarter of the southwest quarter of section nine in township forty-four north of range three east of the Boise meridian, Idaho, containing one hundred sixty acres:

NOW KNOW YE, that the United States of America, in consideration of the premises, has given and granted, and by these presents does give and grant, unto the said Santa Fe Pacific Railroad Company, and to its successors, the lands above described; to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature thereunto belonging, unto the said Santa Fe Pacific Railroad Company, and to its successors and assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged



by the local customs, laws, and decisions of courts. And there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States.

IN TESTIMONY WHEREOF, I, WILLIAM H. TAFT, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed. [163]

GIVEN under my hand, at the city of Washington, the TWENTY-SEVENTH day of MARCH, in the year of our Lord one thousand nine hundred and ELEVEN and of the Independence of the United States the one hundred and THIRTY-FIFTH.

By the President: WM. H. TAFT,

By W. P. LeROY,

Secretary.

H. W. SANFORD,

Recorder of the General Land Office.

[United States General Land Office.]

RECORDED: Patent Number 186176.

[Endorsed]: "26340. U. S. Patent to Santa Fe Pacific Railroad Company. S. 2, N. W. 4, S. W. 4, N. E. 4, N. E. 4, S. W. 4 of Sec. 9, Tp. 44 N., R. 3 E., B. M., 160 acres. Recorded at the request of Milwaukee Lumber Co. Sep. 29, 1911, at 2 o'clock P. M., in Book '42' of Deeds, page 148, Records of Shoshone County, State of Idaho. John S. Sheehy, County Recorder." [164]

**Exhibit "B" [to Answer to Defendant Charles J. Kinsolving et ux. et al.].**

**POWER OF ATTORNEY TO CONVEY LIEU LANDS.**

KNOW ALL MEN BY THESE PRESENTS, That WHEREAS, the Santa Fe Pacific Railroad Company, a corporation duly incorporated under an Act of Congress, approved March 3, 1897, has relinquished to the United States of America, under the Acts of June 4, 1897, and June 6, 1900, the following described lands located within the San Francisco Mountains Forest Reserve, Territory of Arizona, to wit:

The North Half of the Southwest quarter of section twenty-five, township eighteen north, range five east of the Gila and Salt River Base and Meridian, Arizona, containing eighty acres, more or less; and

WHEREAS, The Santa Fe Pacific Railroad Company is entitled to select, in lieu of the lands so relinquished to the United States a like quantity of vacant, surveyed, nonmineral public lands of the United States which are subject to homestead entry:

NOW, THEREFORE, The Santa Fe Pacific Railroad Company has made, constituted and appointed C. J. Kinsolving its true and lawful agent and attorney, for it, and in its name, place and stead, to convey by quitclaim deed all the right, title, interest and claim which the Santa Fe Pacific Railroad Company has, or may hereafter acquire, in the lands so selected or located by said Santa Fe Pacific Rail-

road Company, or its duly appointed attorney in fact, in lieu of the above-described tract or tracts of land relinquished as aforesaid, in whole or in part, to the full amount of the land so relinquished, as such selections shall have been actually made at the United States District Land Office and which shall appear described upon the public records in the office of the Commissioner of the General Land Office of the United States at Washington, D. C., as the lieu lands so selected.

GIVING AND GRANTING unto the said attorney full power and [165] authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in the above premises, as fully to all intents and purposes as it might or could do if personally present, hereby ratifying and confirming all that its said attorney shall lawfully do or cause to be done by virtue of these presents.

And the said Santa Fe Pacific Railroad Company to any grantee in any conveyance executed by said attorney hereby gives notice that said attorney hereunder has authority to convey, in whole or in part, only the lands actually selected in lieu of the premises hereinabove specifically described as such lands shall appear described upon the public records in the office of the Commissioner of the General Land Office of the United States at Washington, D. C., and any substantial variance between the description of the lieu lands so selected, as the same shall appear described upon such public records, and the premises conveyed by said attorney as such lieu lands, shall render any conveyance of the latter hereunder void.

IN WITNESS WHEREOF, The Santa Fe Pacific Railroad Company has caused this instrument to be signed by its President and attested by its Assistant Secretary with its seal this 10th day of January, A. D. 1906.

SANTA FE PACIFIC RAILROAD COMPANY,

By E. P. RIPLEY,  
President.

Attest: E. L. COPELAND, Assistant Secretary.

Signed, sealed and delivered in presence of

E. J. ENGLE,

E. C. HALL,

Witnesses.

State of Illinois,

County of Cook,—ss.

On this 10th day of January, A. D. 1906, before me, Edward J. Engle, a Notary Public in and for said County and State, personally appeared E. P. Ripley, to me personally known to be the [166] President of the Santa Fe Pacific Railroad Company, and who as such President executed the within instrument on behalf of the corporation therein named; and the said E. P. Ripley, being by me duly sworn, did say that he is the President of the said Santa Fe Pacific Railroad Company, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors; and the said E. P. Ripley acknowledged to me that such corporation executed the same, and said instrument to be



the free act and deed of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal, the day and year above written.

EDWARD J. ENGLE,  
Notary Public.

[Edward J. Engle—Notary Public, Cook County, Ills.]

My commission expires April 17, 1909.

[Endorsed]: "26339. Power of Attorney to Convey Lieu Lands. Santa Fe Pacific Railroad Company to C. J. Kinsolving. Dated Jan. 10, 1906. Recorded at the request of Milwaukee Lumber Co. Sep. 29, 1911, at 2 o'clock P. M., in Book 'F' of Powers of Attorney, page 497, Records of Shoshone County, State of Idaho. John S. Sheehy, County Recorder." [167]

**Exhibit "B-1" [to Answer to Defendant Charles J. Kinsolving et ux. et al.]**

**POWER OF ATTORNEY TO CONVEY LIEU  
LANDS.**

KNOW ALL MEN BY THESE PRESENTS, That WHEREAS, The Santa Fe Pacific Railroad Company, a corporation duly incorporated under an Act of Congress, approved March 3, 1897, has relinquished to the United States of America, under the Acts of June 4, 1897, and June 6, 1900, the following described lands located within the San Francisco Mountains Forest Reserve, Territory of Arizona, to wit:

The North half of the Southeast quarter of section twenty-five, township eighteen north,

range five east of the Gila and Salt River Base and Meridian, Arizona, containing eighty acres, more or less; and

WHEREAS, The Santa Fe Pacific Railroad Company is entitled to select, in lieu of the lands so relinquished to the United States, a like quantity of vacant, surveyed, nonmineral public lands of the United States which are subject to homestead entry:

NOW, THEREFORE, The Santa Fe Pacific Railroad Company has made, constituted and appointed C. J. Kinsolving its true and lawful agent and attorney, for it, and in its name, place and stead, to convey by quitclaim deed all the right, title, interest and claim which the Santa Fe Pacific Railroad Company has, or may hereafter acquire, in the lands so selected or located by said Santa Fe Pacific Railroad Company, or its duly appointed attorney in fact, in lieu of the above-described tract or tracts of land relinquished as aforesaid, in whole or in part, to the full amount of the land so relinquished, as such selections shall have been actually made at the United States District Land Office and which shall appear described upon the public records in the office of the Commissioner of the General Land Office of the United States at Washington, D. C., as the lieu lands so selected.

GIVING AND GRANTING unto the said attorney full power and authority to do and perform all and every act and thing whatsoever [168] requisite and necessary to be done in the above premises, as fully to all intents and purposes as it might or could do if personally present, hereby ratifying

and confirming all that its said attorney shall lawfully do or cause to be done by virtue of these presents.

And the said Santa Fe Pacific Railroad Company to any grantee in any conveyance executed by said attorney hereby gives notice that said attorney hereunder has authority to convey, in whole or in part, only the lands actually selected in lieu of the premises hereinabove specifically described as such lands shall appear described upon the public records in the office of the Commissioner of the General Land Office of the United States at Washington, D. C.; and any substantial variance between the description of the lieu lands so selected, as the same shall appear described upon such public records, and the premises conveyed by said attorney as such lieu lands, shall render any conveyance of the latter hereunder void.

IN WITNESS WHEREOF, The Santa Fe Pacific Railroad Company has caused this instrument to be signed by its President and attested by its Assistant Secretary with its seal this 10th day of January, A. D. 1906.

SANTA FE PACIFIC RAILROAD COMPANY,

By E. P. RIPLEY,  
President.

Attest: E. L. COPELAND, Assistant Secretary.

Signed, sealed and delivered in presence of

E. J. ENGLE,

E. C. HALL,

Witnesses.

State of Illinois,  
County of Cook,—ss.

On this 10th day of January, A. D. 1906, before me, Edward J. Engle, a Notary Public in and for said County and State, [169] personally appeared E. P. Ripley, to me personally known to be the President of the Santa Fe Pacific Railroad Company, and who as such President executed the within instrument on behalf of the corporation therein named; and the said E. P. Ripley, being by me duly sworn, did say that he is the President of said Santa Fe Pacific Railroad Company, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors; and the said E. P. Ripley acknowledged to me that such corporation executed the same, and said instrument to be the free act and deed of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Notarial Seal, the day and year above written.

EDWARD J. ENGLE,  
Notary Public.

[Edward J. Engle—Notary Public, Cook County, Ills.]

My commission expires April 17, 1909.

[Endorsed]: "26338. Power of Attorney to Convey Lieu Lands. Santa Fe Pacific Railroad Company to C. J. Kinsolving. Dated Jan. 10, 1906. Recorded at the request of Milwaukee Lumber Co. Sep.



29, 1911, at 2 o'clock P. M., in book 'F' of Powers of Atty., page 496 Records of Shoshone County, State of Idaho. John S. Sheehy, County Recorder." [170]

**Exhibit "C" [to Answer to Defendant Charles J. Kinsolving et ux. et al.].**

THIS INDENTURE, Made the 15th day of September in the year of our Lord one thousand Nine Hundred and Eleven BETWEEN Santa Fe Pacific Railroad Company, a corporation duly incorporated under an Act of Congress approved March 3d, 1897, by C. J. Kinsolving, its attorney in fact of St. Maries, Kootenai County, State of Idaho, party of the first part and the Milwaukee Lumber Company, a corporation, the party of the second part,

WITNESSETH, That the said party of the first part, for and in consideration of the sum of Twelve Thousand (\$12,000.00) Dollars, lawful money of the United States of America, to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents demise, release and forever quitclaim unto the said party of the second part, and to its successors, heirs and assigns forever all that certain lot, piece or parcel of land, situated in the said Shoshone County of State of Idaho and bounded and particularly described as follows, to wit:

The south half of the northwest quarter, the southwest quarter of the northeast quarter, and the northeast quarter of the southwest quarter of Section Nine in Township forty-four, north of Range Three East of the Boise Meridian,

Idaho, containing one hundred and sixty acres, more or less.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

TO HAVE AND TO HOLD ALL and singular the said premises, together with the appurtenances unto said party of the second part, and to its successors and assigns forever. [171]

IN WITNESS WHEREOF, The said party of the first part has hereunto set its hand and seal the day and year first above written.

SANTA FE PACIFIC RAILROAD COMPANY. (Seal)

By C. J. KINSOLVING, (Seal)

Its Attorney in Fact.

Signed, sealed and delivered in presence of

E. B. FLAGG.

M. C. PETERSEN.

State of Idaho,  
County of Kootenai,—ss.

On this 27th day of September, in the year A. D. 1911, before me, M. C. Petersen, a Notary Public, in and for said County and State, personally appeared C. J. Kinsolving, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Santa Fe Pacific Railroad Company and acknowledged to me that he subscribed the name of said railroad company thereto

as principal and his own name as attorney in fact.

M. C. PETERSEN,

Notary Public in and for said County and State.

[M. C. Petersen, Notary Public, Kootenai County, Idaho.]

[Endorsed]: "26341. Quitclaim Deed—Santa Fe Pacific Railroad Company to Milwaukee Lumber Co. State of Idaho, County of Shoshone,—ss. Filed for record at the request of Milwaukee Lumber Co. on the 29th day of September, 1911, at 2 o'clock P. M. and recorded in Book '42' of Deeds, on page 149. John S. Sheehy, County Recorder." [172]

**Exhibit "D" [to Answer to Defendant Charles J. Kinsolving et ux. et al.].**

THIS AGREEMENT, made and entered into this 25th day of September, A. D. 1911, by and between Elix Lindquist and Lyn Lundquist, copartners doing business under the firm name and style of Lindquist & Lundquist, parties of the first part, and the Milwaukee Lumber Company, a corporation, party of the second part.

WITNESSETH: That for the consideration hereinafter mentioned the party of the second part agrees and binds itself to sell to the parties of the first part the following described tract of land, to wit: The S.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$ , the NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$ , the SW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$ , Sec. 9, T. 44 N., R. 3 E., B. M., at the agreed price of the sum of Twelve Thousand Dollars (12,000.00), to be paid as follows, to wit: Said parties agree and bind themselves to cut, skid, haul and deliver all the live merchantable white pine

timber now standing, lying or being upon said land cut into saw logs according to directions to be furnished by second party, which said timber and logs are to be delivered into the waters of the St. Joe River at the mouth of Marble Creek; said logs to be not less than eight inches in diameter, nor to scale less than sixty-five per cent sound and live white pine timber. It is agreed and understood that the second party will allow first party the price of eleven dollars per thousand feet for logs averaging not more than six and one-half logs to the thousand feet, smaller white pine logs to be paid for at the rate of nine dollars per thousand feet; all logs to be scaled by the "Scribner C" rule and payments made and advanced thereon as follows: Upon said logs being skidded upon the bank of Marble Creek there shall be advanced thereon the sum of nine dollars per thousand feet based upon a scale to be made by a scaler agreed upon by the parties hereto, or in case they cannot agree then by the State scaler who shall make weekly reports of his scale to each party hereto and once every thirty days during the life of this contract there shall be advanced upon the logs scaled the thirty days immediately preceding said date which date shall be as soon as may be upon or after the tenth day of each and every month during the life of said contract the said sum of nine dollars per thousand feet for all logs scaled the previous thirty days and upon which no advancements shall have been made; said advancements of nine dollars per thousand feet to be made as follows: The sum of four dollars per thousand feet is to be retained and



to be applied upon the purchase of said land, the remaining five dollars to be advanced and paid to first parties, the remainder of the price of said logs is to be retained by second party until said logs are delivered into the waters of the St. Joe River as aforesaid, and in case the sum of four dollars per thousand feet is not sufficient to pay the purchase price of said land the second party shall have the right to apply the said remainder or sufficient portion thereof to discharge the purchase price of said land. It is understood, however, that parties of the second part are to be saved harmless on account of any labor or supply liens, claims or demands and that before making any such payments upon said logs the parties of the first part shall satisfy the second party that there are no claims against said logs which might become liens and said second party shall have the right to apply such advancement to the discharge of any debt or claim which might become a lien upon said logs before paying any portion thereof to first party. It is understood and agreed that the title to said lands shall remain in the Milwaukee Lumber Company until the said full sum of Twelve Thousand Dollars has been paid according to the terms and conditions of this contract, and upon the payment of said sum and upon the fulfillment of all conditions and covenants in this contract the said Milwaukee Lumber Company agrees and binds itself to convey said land by a quitclaim deed to first parties or to any person that they shall direct. It is understood and agreed that said logs shall be scaled by a scaler to be agreed upon by the parties to this

contract and in case of failure to agree the State scaler shall perform said work and that weekly reports shall be made to each party hereof of the scale of said logs and each party shall share equally the expense of any such [173] scaler under this contract except that first parties are to furnish board and sleeping accommodations to any such scaler or check scaler employed upon said work, free of charge. Said timber is to be delivered not later than the Spring drive of the year 1912; said first parties are to disclose to second party all supply bills and unpaid labor upon the logs in question at any time when requested so to do by second party for the purpose of protecting them against liens and in making the payments and advancements aforesaid and in case said labor and supply bills exceed the amount upon the skids at any time the entire amount of said advancements shall be retained to apply on said liens or claims and no part thereof shall be payable to second party until such time as said advancements exceed the amount of any claims which might become liens upon said logs at which time any balance is to be paid to the first parties, except the four dollars aforesaid. The parties of the first part shall have the right to assign this contract and the benefits thereof to the Lumberman's State Bank for the purpose of securing any advancements made by said bank to them which said right and assignment shall be subject of all the conditions of this contract.

This contract shall bind the heirs, personal representatives, executors and assigns of the parties thereto.

IN WITNESS WHEREOF, the parties hereto have caused this contract to be signed, sealed and delivered this 25th day of September, A. D. 1911.

ELIX LINDQUIST.

LYN LUNDQUIST.

MILWAUKEE LUMBER CO. (Seal)

By A. E. BRADRIK. (Seal)

Attest: E. B. FLAGG.

[Endorsed]: Filed October 5, 1912. A. L. Richardson, Clerk. By M. W. Griffith, Deputy. [174]

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*In the District Court of the United States for the Northern Division, District of Idaho.*

McGOLDRICK LUMBER COMPANY, a Corporation,

Plaintiff,

vs.

CHAS. J. KINSOLVING and JANE DOE KINSOLVING (Whose Real Name is Unknown), His Wife; MILWAUKEE LUMBER COMPANY, a Corporation; JOHN DOE LUNDQUIST (Whose True Name is Unknown), and RICHARD ROE LINDQUIST (Whose Real Name is Unknown), JOHN DOE (Whose Real Name is Unknown), and RICHARD ROE (Whose True Name is Unknown),

Defendants.

**Answer of Lyn Lundquist and Elix Lindquist.**

Answer of Lyn Lundquist and Elix Lindquist, doing business under the firm name and style of Lundquist and Lindquist, two of the above-named

defendants to the bill of complaint of the McGoldrick Lumber Company, complainant.

These defendants now and at all times hereafter saving to themselves all, and all manner of benefit or advantage of exception or otherwise, that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much thereof as these defendants are advised it is material or necessary for them to make answer to, answering says:

### I.

That the defendants are and were at the time the bill was filed interested in the subject matter of this suit by virtue of a certain written contract of sale, made and executed on the 25th day of September, 1911, by and between Elix Lindquist and Lyn Lundquist, [175] copartners, doing business under the firm name and style of Lindquist & Lundquist, as parties of the first part, and the Milwaukee Lumber Company, a corporation, parties of the second part, a copy of which contract is hereto attached and marked Exhibit "A," and expressly made a part hereof.

### II.

These defendants admit that the McGoldrick Lumber Company is a corporation, organized under the laws of the State of Washington, and that the subject matter of the suit consists of real estate, situated in the County of Shoshone, State of Idaho, and is as described in plaintiff's bill of complaint and of the reasonable value of Five Thousand (\$5,000.00) Dollars.



## III.

These defendants admit that on the 26th day of September, 1906, John Shannon made and filed in the United States Land Office at Coeur d'Alene, Idaho, his timber and stone application for the S.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  of Section 9, Township 44 N., Range 3 E., W. M., being the lands involved in this controversy, and that said timber and stone application was in the manner and form prescribed by law, and executed in conformity to the rules and regulations described by the Department of the Interior for the entry of lands under the Act of Congress dated June 3, 1878 (20 Stats. at L. 89), and that Exhibit "A" of plaintiff's complaint is a copy of said application.

## IV.

These defendants admit that final proof on said timber and stone application was made in accordance with the rules and regulations of the Department of the Interior, and was in due form, and that Exhibit "B" attached to plaintiff's complaint is a copy thereof, but deny that the said John Shannon then and there in all ways complied with the law governing the entry of public lands under the timber and stone laws and the rules and regulations of the United [176] States or Department of the Interior governing entry of lands under said act, and deny that said Shannon made a valid or legal entry or purchase of said lands, and deny that the said John Shannon thereupon became or was the owner in equity or otherwise of said lands or was entitled to have issued or delivered to him letters patent

under the seal of the United States conveying unto him or to his heirs legal title to said lands in fee simple absolute or at all.

## V.

Deny that on the 25th day of ———, 1907, Roy Lammers, acting as agent of complainant, purchased said land from said entryman for the sum of Eight Thousand (\$8,000.00) Dollars, and deny that the said John Shannon then and there by warranty deed conveyed said land to Lammers, but admit that a copy of said alleged deed is attached to complainant's bill of complaint and marked Exhibit "C," but deny that said Lammers took title to said land as trustee for complainant or at all, and deny that said Roy Lammers thereafter conveyed said land to the McGoldrick Lumber Company and deny that the said McGoldrick Lumber Company is now or ever has been the owner in equity or otherwise of said land, or at all, and deny that it is entitled to possession thereof and deny that it is entitled to receive or to be vested with legal title thereto, through a conveyance of said legal title from the United States of America, by its proper officers to the said John Shannon, or at all.

## VI.

Deny that the McGoldrick Lumber Company was a *bona fide* purchaser of said land for value without notice of any defect in the title or relied upon by the receiver's receipt issued to the said John Shannon, and avers that it was incumbent upon said McGoldrick Lumber Company to ascertain whether said receiver's receipt was issued upon such representa-

tions, which if true would entitle the said Shannon to a patent for said land from the United States.

#### VII.

Admit that on the 16th day of July, 1907, the defendant [177] Chas. J. Kinsolving filed his affidavit of contest against the said entry, which affidavit is in words and figures as set forth in said bill of complaint.

#### VIII.

Admit that notice of hearing was given in the manner and form as set forth by Complainant's Exhibit "D" and that on May 13, 1908, a hearing was had before the Register and Receiver, United States Land Office, Coeur d'Alene, Idaho, at which hearing evidence was introduced in behalf of the contestant Chas. J. Kinsolving, and in behalf of the entryman John Shannon and in behalf of Roy C. Lammers and the McGoldrick Lumber Company; but as to whether such evidence so introduced at the said hearing was in strict conformity with the proceedings attached to plaintiff's complaint and marked Exhibit "E," these defendants have no knowledge or information upon which to form a belief and therefore deny the same.

#### IX.

Admit that the Register and Receiver, United States Land Office, at Coeur d'Alene, Idaho, reviewed the evidence adduced at such hearing and rendered a decision thereon in favor of the contestant Chas. J. Kinsolving and recommended the cancellation of said entry, and admit that a copy of said decision

is contained in Complainant's Exhibit "F" attached to said complaint.

### X.

Admit that at the beginning of such proceedings before the Register and Receiver, the McGoldrick Lumber Company demurred to the affidavit of contest on the ground that the statements therein made were insufficient to support a contest or any order looking to the cancellation of said entry and objected to the Register and Receiver hearing proof thereon, which demurrer was overruled, but deny that the subsequent introduction of testimony by the contestant Chas. J. Kinsolving was against the rights of complainant or that the said Register and Receiver committed any error of law prejudicial of the [178] rights of the said McGoldrick Lumber Company, complainant herein.

### XI.

Admit that at said hearing a certified copy of a contract between the entryman John Shannon and Wm. McCarter was offered in evidence and that a copy of said contract is attached to plaintiff's bill and marked Exhibit "A," admit that complainant objected to said offer upon the grounds set forth in Exhibit "E," and that said objection was sustained, but deny that in making and rendering their decision, the Register and Receiver of the United States Land Office at Coeur d'Alene, Idaho, treated said contract as in evidence.

### XII.

Admit that at the conclusion of plaintiff's testimony in said contest case, complainant herein moved



for the dismissal of the contest on the ground that no evidence was introduced to affect the validity of the entry made by John Shannon, and admit that the Register and Receiver overruled said motion, but deny that in overruling said motion the Register and Receiver committed any error of law prejudicial to the rights of complainant herein.

### XIII.

Admit that after the conclusion of the taking of the testimony before the Register and Receiver, complainant herein renewed its motion to dismiss said proceedings and admit that the said Register and Receiver overruled said motion, but deny that they erred in law thereby to the prejudice of the rights of complainant herein or at all.

### XIV.

Admit that the said Register and Receiver found that said entry was made for speculative purposes and not for the sole and exclusive use or benefit of said applicant, but deny that said decision was wrongful or unlawful or contrary to the evidence adduced at said hearing and deny that there was an insufficiency of evidence to support the finding that John Shannon did not make the entry for his own sole and exclusive benefit, and deny, in making the findings, [179] the law applicable to such case was misinterpreted, or that such finding was without evidence to support it, and avers that the decision of the Register and Receiver in said case was proper and in accordance with the law and facts in the case.

### XV.

Admit that thereafter said case was appealed to

the Commissioner of the General Land Office at Washington, D. C., and that said Commissioner affirmed the said decision of the Register and Receiver and that said affirmation of said decision is set forth in Exhibit "G" attached to complainant's complaint.

#### XVI.

Deny that the Commissioner of the General Land Office in rendering said decision treated or considered said contract as in evidence or that any error of law prejudicial to the rights of complainant was committed; and deny that the said Commissioner ignored the evidence adduced at said hearing and avers that said decision as set forth in Complainant's Exhibit "G" was justified by the law and the facts in the case.

#### XVII.

Admit that thereafter said case was appealed to the Secretary of the Interior and that thereafter said decision was affirmed by said Secretary of the Interior, and that Exhibit "H" attached to the complainant's bill of complaint is the decision of said Secretary.

#### XVIII.

Deny that said decision was erroneous in law or was influenced by said contract or that it was not in strict accordance with the law and fact in the case.

#### XIX.

Admit that thereafter, to wit, on the 25th day of October, 1910, the defendant Kinsolving filed a lieu selection on said land and that thereafter he received a patent from the United States for said land, and

admit that the said Kinsolving thereafter held the legal title and still holds said legal title except as hereinafter set forth. [180]

XX.

Admit that the Milwaukee Lumber Company has some interest in said premises described.

XXI.

Further answering plaintiff's bill and amended and supplemental bill, these defendants admit that on or about the 15th day of September, 1911, the defendant Charles J. Kinsolving executed an instrument of conveyance of the property hereinbefore described to the Milwaukee Lumber Company and that said instrument of conveyance is recorded in the County of Shoshone *County*, State of Idaho, in Book 42, page 149, of the records of said county, but deny that said transfer was without consideration or in fraud of the rights of complainant or was made by or through a conspiracy on the part of said defendants, to defraud the rights of complainant.

XXII.

Admit that said land is largely valuable for the timber growing thereon.

XXIII.

Deny that Chas. J. Kinsolving or the said Milwaukee Lumber Company, or their agents, entered on the said premises October 1, 1911, or at all, for the purpose of carrying out said alleged conspiracy or to defraud the rights of complainant or at all, but admit that John Doe Lundquist, whose true name is Lyn Lundquist, and Richard Roe Lindquist, whose true name is Elix Lindquist, entered upon said prem-

ises about October 1, 1911, in accordance with the terms of a written contract of sale made and entered into September 25, 1911, by and between Elix Lindquist and Lyn Lundquist and the Milwaukee Lumber Company, a copy of which is hereto attached and marked Defendants' Lundquist and Lindquist, Exhibit "A," and made a part of this answer, and thereupon commenced to cut and remove the timber from said land for the purpose of converting said timber into lumber, and alleges that upon entering said land they did so in accordance with the terms of said written contract for the purpose of removing [181] the timber therefrom for profit to themselves, and allege that they continued to cut and remove and prepare to cut and remove the timber from said land until enjoined from proceeding further with said logging operation by an order of this Court.

#### XXIV.

Alleges that said injunction was wrongfully and unlawfully sued out of this court, to the great damage of these answering defendants in the sum of Twelve Thousand (\$12,000.00) Dollars.

#### XXV.

And these defendants deny all and all manner of unlawful or irregular proceedings upon the part of the Register and Receiver, Commissioner of the General Land Office, or of the Secretary of the Interior in rendering the decisions which have been rendered and which are attached to complainant's complaint and made a part thereof, and deny that the said Shannon made or perfected the said timber or stone entry in good faith or for his own use and



benefit, or that any error of law was committed in the opinions deciding said contest case.

WHEREFORE, these defendants ask that the plaintiff's bill may be dismissed at its costs, and that these defendants' title in and to the said land under and by virtue of the said contract be confirmed as against any title of plaintiff.

A. G. ELSTON,

Attorney for Lyn Lundquist and Elix Lindquist. [182]

**Exhibit "A" [to Answer to Lyn Lundquist et al.].**

THIS AGREEMENT, made and entered into this 25th day of September, A. D. 1911, by and between Elix Lindquist and Lyn Lundquist, copartners, doing business under the firm name and style of Lindquist & Lundquist, parties of the first part, and the Milwaukee Lumber Company, a corporation, party of the second part.

WITNESSETH: That for the consideration hereinafter mentioned the party of the second part agrees and binds itself to sell to the parties of the first part the following described tract of land, to-wit: S.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$ , the NE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ , the SW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$ , Sec. 9, T. 44 N., R. 3, E. M., at the agreed price of the sum of Twelve *Thousand* (\$12,000.00) to be paid as follows, to wit: Said parties agree and bind themselves to cut, skid, haul and deliver all the live merchantable white pine timber now standing, lying or being upon said land cut into sawlogs according to directions to be furnished by second party, which said timber and logs are to be into the waters of the St. Joe River at

the mouth of Marble Creek; said logs to be not less than eight inches in diameter, nor to scale less than sixty-five per cent sound and live white pine timber. It is agreed and understood that the second party will allow first party the price of eleven dollars per thousand feet for logs averaging not more than six and one-half logs to the thousand feet, smaller white pine logs to be paid for at the rate of nine dollars per thousand feet; all logs to be scaled by the "Scribner C" rule and payments made and advanced thereon as follows: Upon said logs being skidded upon the bank of Marble Creek there shall be advanced thereon the sum of nine dollars per thousand feet, based upon a scale to be made by a scaler agreed upon by the parties thereto, or in case they cannot agree then by the State Scaler, who shall make weekly reports of his scale to each party thereto, and once every thirty days during the life of this contract there shall be advanced upon the logs scaled the thirty days immediately preceding said date, which said date shall be as soon as may be upon or after the tenth day of each and every month during the life of said contract the said sum of nine dollars per thousand feet for all logs scaled the previous thirty days and upon which no advancement shall have been made; said advancement of nine dollars per thousand feet to be made as follows: The sum of four dollars per thousand feet is to be retained and to be applied upon the purchase of said land, the remaining five dollars to be advanced and paid to first parties, the remainder of the price of said logs is to be retained by second party until said

logs are delivered into the waters of the St. Joe River as aforesaid and in case the sum of four dollars per thousand feet is not sufficient to pay the purchase price of said land the second party shall have the right to apply the said remainder or sufficient portion thereof to discharge the purchase price of said land. It is understood, however, that parties of the second part are to be saved harmless on account of any labor or supply liens, claims or demands, and that before making any such payments upon said logs the parties of the first part shall satisfy the second party that there are no claims against said logs which become liens and said second party shall have the right to apply such advancement to the discharge of any debt or claim which might become a lien upon said logs before paying any portion thereof to first party. It is understood and agreed that the title to said lands shall remain in Milwaukee Lumber Company until the said full sum of *Twelve Dollars* has been paid according to the terms and conditions of this contract and upon the payment of said sum, and upon the fulfillment of all covenants in this contract the said Milwaukee Lumber Company agrees and binds itself to convey said land by a quitclaim deed to first parties or to any person that they shall direct. It is understood and agreed that said logs shall be scaled by a scaler to be agreed [183] upon by the parties to this contract and in case of failure to agree the State Scaler shall perform said work and that weekly reports shall be made to each party thereto of the scale of said logs and each party shall share equally the ex-

pense of any such scaler under this contract except that the first parties are to furnish board and sleeping accommodations of any such scaler or check scaler employed upon said work, free of charge. Said timber is to be delivered not later than the spring drive of the year of 1912; said first parties are to disclose to second party all supply bills and unpaid labor upon the logs in question at any time when requested so to do by second party for the purpose of protecting them against liens and in making the payments and advancements aforesaid, and in case said labor and supply bills exceed the amount upon the skids at any time, the entire amount of said advancement shall be retained to apply on said liens or claims, and no part thereof shall be payable to second party until such time as said advancements exceed the amount of any claims which might become liens upon said logs at which time any balance is to be paid to the first parties except the four dollars aforesaid, the parties of the first part shall have the right to assign this contract and the benefits thereof to the Lumberman's State Bank for the purpose of securing any advancements made by said bank to them which said right and assignment shall be subject to all the conditions of this contract.

This contract shall bind the heirs, personal representatives, executors and assigns of all the parties thereto.

In witness whereof the parties hereto have caused this contract to be signed, sealed and deliv-



ered this 25th day of September, A. D. 1911.

ELIX LINQUIST.

LYN LUNDQUIST.

MILWAUKEE LUMBER CO.

By A. V. BRADRICK,

Sec.

Attest: O. B. FLAGG.

Service of the within Answer, by copy, is hereby admitted this 16th day of Nov., 1912.

HAPPY, CULLEN, LEE & HINDMAN,

Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 23, 1912. A. L. Richardson, Clerk. [184]

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*In the District Court of the United States for the  
District of Idaho, Northern Division, Holding  
Terms at Coeur d'Alene.*

IN EQUITY—No. —.

McGOLDRICK LUMBER CO., a Corporation,  
Complainant,

vs.

CHARLES J. KINSOLVING and JANE DOE  
KINSOLVING et al.,  
Defendants.

**Replication to Answer of Defendants Charles J.  
Kinsolving, Jane Doe Kinsolving, His Wife, and  
the Milwaukee Lumber Company.**

The Replication of the above-named complainant to the answer of the above-named defendants, Charles J. Kinsolving and Jane Doe Kinsolving, his wife, and the Milwaukee Lumber Company, a corporation, defendants:

This replicant, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of said defendants, for replication thereunto saith that it does and will ever maintain and prove its said bill to be true, certain, and sufficient in the law to be answered unto by said defendants, and that the answer of said defendants is very uncertain, evasive, and insufficient in the law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, confessed, or avoided, traversed, or denied, is true; all which matters and things this replicant is ready to aver, maintain, and prove as this Honorable Court shall direct, and humbly as in and by its said bill it has already prayed.

F. M. DUDLEY,  
HAPPY, CULLEN, LEE & HINDMAN,  
Solicitors for Complainant. [185]

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*In the District Court of the United States for the  
District of Idaho, Northern Division, Holding  
Terms at Coeur d'Alene.*

McGOLDRICK LUMBER CO., a Corporation,  
Complainant,

vs.

CHARLES J. KINSOLVING and JANE DOE  
KINSOLVING et al.,  
Defendants.

**Affidavit of Service [of Replication to Answer of  
Defendants Charles J. Kinsolving et ux.].**

State of Washington,  
County of Spokane,—ss.

Mollie Remington, being duly sworn, deposes and says: That she is a citizen of the United States, over the age of twenty-one; not a party to the above-entitled action, and competent to be a witness herein; that on October 4th, 1912, in Spokane, Washington, she served the enclosed replication on Messrs. Forney & Moore, attorneys for the defendants, Charles J. Kinsolving and Jane Doe Kinsolving, his wife, by then and there depositing in the United States mail a true and correct copy of the said replication in a sealed envelope, properly addressed to Messrs. Forney & Moore, Moscow, Idaho, with the postage thereon duly prepaid.

**MOLLIE REMINGTON.**

Subscribed and sworn to before me this 24th day  
of October, 1912.

**B. A. HOFFINE,**  
Notary Public in and for the State of Washington,  
Residing at Spokane.

[Endorsed]: Filed Oct. 26, 1912. A. L. Richardson, Clerk. By E. B. Yarrington, Deputy Clerk.  
[186]

*In the District Court of the United States for the  
District of Idaho, Northern Division, Holding  
Terms at Coeur d'Alene.*

No. —.

McGOLDRICK LUMBER CO., a Corporation,  
Complainant,

vs.

CHARLES J. KINSOLVING and JANE DOE  
KINSOLVING et al.,

Defendants.

**Replication to Answer of Defendants Lyn  
Lundquist and Elix Lindquist.**

The Replication of the above-named complainant to the answer of the defendants, Lyn Lundquist and Elix Lindquist.

This replicant, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of said defendants, for replication thereunto saith that it does and will ever maintain and prove its said bill to be true, certain, and sufficient in the law to be answered unto by said defendants, and that the answer of said defendant is very uncertain, evasive, and insufficient in the law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, confessed, or avoided, traversed, or denied, is true; all of which matters and things this replicant is ready to aver, maintain, and prove as



this Honorable Court shall direct, and humbly as in and by its said bill it has already prayed.

F. M. DUDLEY,  
HAPPY, CULLEN, LEE & HINDMAN,  
Solicitors for Complainant.

[Endorsed]: Filed Dec. 4, 1912. A. L. Richardson, Clerk. [187]

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*In the District Court of the United States for the  
District of Idaho, Northern Division.*

McGOLDRICK LUMBER COMPANY,  
Plaintiff,

vs.

CHARLES J. KINSOLVING and JANE DOE  
KINSOLVING, Whose Real Name is Un-  
known, His Wife, and MILWAUKEE LUM-  
BER COMPANY, a Corporation,  
Defendants.

**Decision.**

Feb. 6, 1914.

F. M. DUDLEY, CULLEN, LEE & FOSTER,  
and JOHN P. GRAY, Attorneys for Plain-  
tiff.

FORNEY & MOORE, R. B. NORRIS, and A. G.  
ELSTON, Attorneys for Defendants.

DIETRICH, District Judge:

In overruling the demurrer to the complaint without prejudice to the further consideration of the points urged, it was hoped from the answer, and the evidence to be adduced, a measure of light might be

thrown upon the perplexing questions presented by the record in the land office. But it now turns out that, with unimportant exceptions, a complete copy of this record was exhibited together with the bill, and the evidence since taken lends little, if any, assistance; consequently the questions still are substantially those raised by the demurrer.

There is little controversy touching the general principles of law by which courts are guided and limited in their interference with the proceedings of the land department, the real [188] question being one of the application of such principles to the facts and circumstances of the case. An extended review of the transactions involved is not thought to be necessary. I am unable to yield to the plaintiff's contention that the Shannon-McCarter agreement was not before the land department. True, objections to its introduction were sustained by the Register and Receiver, but such ruling, as I understand the practice, did not operate to exclude the exhibit from the record, and it is apparent from the opinion of the Assistant Commissioner that he took it into consideration. Furthermore, I think that under the liberal rules of evidence prevailing in the land department the offer was competent; that the instrument was material is not open to serious question. Not that it directly pertains to the specific entry under consideration, or is conclusive of the invalidity thereof, but at least it is a circumstance strongly tending to disclose the entryman's attitude toward the law, and his willingness to enter into such an unlawful arrangement as is here charged.

It is further to be remarked that unless the conclusion reached in the land office is adopted, Johnson's relation to the entry remains an unsolved mystery. Both his explanation and that of Shannon of his interest are wholly unworthy of credence, and the characterization of their testimony in this respect by the Assistant Commissioner is fully warranted.

The view I have taken of the entire record in the land department is about this: Upon strict analysis, and under the rules prevailing in courts of law, the evidence is insufficient to support a finding that Shannon entered into any agreement or arrangement violative of the law, as the same has been construed in the Budd and Williamson cases; at least affirmative relief upon such a theory would be unwarranted. And still the circumstances, remote and meager though they may be, are such that the mind has difficulty in escaping the general impression that there existed some sort of illegitimate relation between Johnson and Shannon [189] touching this entry. That they were of the opinion that there was something to cover up is scarcely open to doubt. In a sense, as long as the controversy was in the land department, Shannon was seeking affirmative relief,—the burden was upon him to show that he was entitled to receive the patent which he sought to have issued. The officers of the land department were within their rights in requiring of him a candid disclosure of his relations with Johnson, and of the source from which he received the money with which he paid the purchase price of the land, in order that they might from such facts intelligently determine

whether or not he was entitled to patent. Such a disclosure he declined to make. Moreover, in its investigation of the facts, the Department is not necessarily bound by the strict rules of evidence prevailing in courts of law, and clearly the standard or measure of proof required in suits in equity to cancel patents is not demanded in a proceeding such as this in the land office. It was not necessary here to overthrow the presumptions attending a patent, for the very good reason that no patent had been issued. That class of cases, therefore, of which the Maxwell Land Grant case is a conspicuous example, is not in point.

Added to the considerations already suggested is the further one that the Register and Receiver, the Assistant Commissioner, and the First Assistant Secretary of the Interior, some of whom at least were learned in the law, and whose integrity is not called into question, acting successively, all reached the same conclusion. Evidence having such potency should not be held to be unsubstantial or without probative value except for the clearest and most cogent reasons.

It is true that Johnson's part in the transaction could be explained as well by assuming that he entered into some sort of an agreement with Shannon after the entry was initiated, and before final proof, as by assuming that such an agreement was made [190] prior to the entry; and at the time the demurrer was passed upon it was thought that possibly the land officials had disposed of the proceeding without regard to the principle enunciated in the



Williamson case, but *it now* called to my attention that the Williamson case was decided prior to any one of the three decisions in the land department, and therefore it cannot be assumed that the rule announced in the Williamson case was unknown to the land department, nor is it to be presumed that the officers wilfully disregarded it. In that view, the action of the department cannot be set aside upon the theory that it was based upon an erroneous view of the law. Indeed, there seems to be but a single question, and that is, whether or not there was any substantial evidence to support the conclusion reached by the land officers, and while the proofs are meager in the extreme, still, for the reasons already stated, it is not thought that a finding that the department acted arbitrarily would be warranted. As a rule, fraud is susceptible of proof only by means of circumstantial evidence and, as suggested in the memorandum decision upon the demurrer, the circumstances are sufficient at least to arouse suspicion, and in this particular case they seem to have been sufficient to produce conviction in the minds of those who were charged with the responsibility of disposing of the public lands, and who appear to have had no reason or motive for doing an injustice in the premises. In this aspect the case is not substantially unlike that of *Bailey v. Sanders* (228 U. S. 603), as will more clearly appear from an examination of the record and the opinion on file in this court. It was there contended by the plaintiff that the department had committed a "gross mistake of fact," and in the opinion rendered January

4, 1908, after a review of the few cases in which this phrase is found, it was said: "If the view most favorable to the plaintiff be adopted, namely, that the Courts will revise the action of the Land Department where there has been [191] a 'gross mistake of fact,' is such a mistake disclosed by the record here? Whatever may be the precise definition and meaning of this phrase, it certainly cannot be held to embrace a mere insufficiency of the evidence to support a finding. It must imply a willingness on the part of the officer to favor one party as against the other, or a carelessness amounting to a wanton disregard of a party's legal rights.

"Is any such disposition on the part of the Secretary of the Interior, or, indeed, of any of the officers of the Land Department, exhibited by the record in this case? It may be that the evidence is meager; and, indeed, it is possible that upon an application of the strict rules of evidence which obtain in the courts, it might be held that the finding of the Secretary is not sufficiently supported; that I do not decide. But it is clear that the Secretary of the Interior was not actuated by any corrupt or improper motive, and that, on the other hand, after a painstaking examination of the record, he was convinced that the facts justified the finding complained of, and that in cancelling the entry he sincerely believed substantial justice was being done. While it may be that the evidence is not sufficient to show an unlawful agreement, it cannot be said that there was not any evidence tending to support such finding. . . .

"That is, substantially, all the direct testimony

given relative to the alleged agreement. It is vague and inconclusive, and yet, even considering it apart from other circumstances, it is difficult to escape the conclusion that some kind of an agreement was entered into concerning the sale of the land. . . .

“It is an elementary rule that where circumstantial evidence leaves an issue in doubt, and one of the parties to the controversy has, in his exclusive possession, documentary evidence, or, within his knowledge, facts, which if disclosed would clear up the doubt, his failure to produce such documents or to disclose such knowledge, warrants the tribunal in resolving the doubt against him; and this rule applies with all the more force to [192] proceedings in the Land Department where there are lacking some of the means at the command of the Courts for compelling the production of evidence. *Smith vs. Brearly*, 9 L. D. 175. *United States vs. Sawbridge*, 11 L. D. 579.”

These views appear to be pertinent to the present case, and are still thought to be sound. It is accordingly held that the bill must be dismissed.

[Endorsed]: Filed February 6, 1914. A. L. Richardson, Clerk. [193]

*In the District Court of the United States for the  
District of Idaho, Northern Division.*

No. 519.

McGOLDRICK LUMBER COMPANY,

Plaintiff,

vs.

CHARLES J. KINSOLVING and JANE DOE  
KINSOLVING, Whose Real Name is Un-  
known, His Wife, and MILWAUKEE LUM-  
BER COMPANY, a Corporation,

Defendants.

**Judgment of Dismissal.**

This cause came on for final hearing before the Court, and the court upon due consideration of the bill, the answer, the replication, the evidence, and the arguments of counsel doth now

ORDER, ADJUDGE AND DECREE that this suit be and the same is hereby dismissed with costs to the defendants, to be taxed.

Dated this 9th day of March, 1914.

FRANK S. DIETRICH,

Judge.

Costs taxed at \$123.20.

[Endorsed]: Filed March 9, 1914. A. L. Richardson, Clerk. [194]



*In the District Court of the United States for the  
District of Idaho, Northern Division.*

McGOLDRICK LUMBER COMPANY,

Complainant,

vs.

CHARLES J. KINSOLVING, and JANE DOE  
KINSOLVING, Whose Real Name is Un-  
known, His Wife, and MILWAUKEE LUM-  
BER COMPANY, a Corporation, and LYN  
LUNDQUIST and ELIX LINDQUIST,  
Defendants.

**Statement of Evidence to be Included in Record on  
Appeal.**

The above-entitled cause came on for trial and hearing before the District Court of the United States for the District of Idaho, Northern Division, Honorable Frank S. Dietrich, presiding, on the 2d day of December, 1913, said Judge sitting without a jury. The following appearances were made: F. M. Dudley, W. E. Cullen and John P. Gray, appeared as solicitors for complainant, and Forney & Moore and R. B. Norris appeared as solicitors for defendants, and the other defendants appeared not.

Thereupon witnesses were called, sworn and examined and the following testimony was introduced in said cause:

The COURT.—I am not clear, gentlemen, just what the status of this case is.

Mr. GRAY.—The case was at issue, and it was referred, and no testimony was taken excepting cer-

tain things were stipulated, and then upon stipulation it was agreed that [195] any other or further testimony might be taken before the Court.

Mr. MOORE.—The proceedings before the Commissioner are fully covered, I think, by this stipulation, with the exception of perhaps one or two little matters, but I desire to say to the Court that a hasty examination of the bill of complaint, which purports to set up all the proceedings taken in the matter of a contest between John Shannon, the original entryman, and one of the defendants, Kinsolving, in the land office, shows that some of the exhibits are not there, that some exhibits were offered and rejected by the local officers, and under their practice became a part of the record any way, but I find that practically all of the exhibits attached to the complaint are Exhibits “A,” “B,” “C,” “E,” and “H,” and then there are absent Exhibits “F” and “G,” and an Exhibit “I.” We had a stipulation at one time that all of the absent exhibits might be filed subsequently as a part of the bill of complaint, and I think perhaps two of those exhibits were filed.

Whereupon it was agreed in open court that any exhibits referred to in the testimony in said contest case in the United States Land Office at Coeur d’Alene, Idaho, in which Charles J. Kinsolving was contestant and John Shannon contestee, might be supplied at any time prior to the time briefs were presented to the Court, and that a certified copy of said Exhibit “I” should be procured from the General Land Office and filed in the case.

The COURT.—When this record is made up, if

this letter isn't here it may or may not be considered highly material, but you will have to proceed now in some way, and you can supply this letter later on.  
[196]

There was thereupon presented to the Court two stipulations between the parties to this action. The two stipulations were in words and figures as follows, to wit:

*“In the Circuit Court of the United States for the Ninth Circuit, District of Idaho, Northern Division, Holding Terms at Coeur d’Alene.*

McGOLDRICK LUMBER CO.,

Complainant,

vs.

CHARLES J. KINSOLVING and JULIA E. KINSOLVING, His Wife; MILWAUKEE LUMBER COMPANY, a Corporation, JOHN DOE LUNDQUIST (Whose True Name is Unknown); and RICHARD ROE LINDQUIST (Whose True Name is Unknown), and JOHN DOE (Whose Real Name is Unknown), and RICHARD ROE (Whose True Name is Unknown),

Defendants.

**Stipulation [Re Testimony Taken Before Register and Receiver, etc.].**

IT IS HEREBY STIPULATED, by and between the respective parties hereto, by and through their respective attorneys, as follows, to wit:

1. It is stipulated and agreed that the transcript of the testimony attached to the complainant's Bill

of Complaint, together with the exhibits attached to said transcript, is a full, true and correct transcript of the testimony taken before the Register and Receiver, and of the exhibits referred to in the said testimony, and that the same may be used as such upon the full hearing of this cause, and as if given in proof herein before the said referee, including supplemental exhibits, [197] etc., and that the witnesses would testify as therein set out in said transcript and said testimony used as the testimony in this court.

2. It was further stipulated and agreed that Roy C. Lammers was the agent of the complainant, McGoldrick Lumber Company in making the purchase of the said land, and that whatever title he acquired by said purchase was acquired for and in behalf of said complainant, and in its interest, and the said complainant is the real party in interest in said controversy, and that the said title so acquired and the said purchase thereof was made in behalf of said complainant by the said Roy C. Lammers, as detailed in the transcript of the testimony attached as an exhibit to complainant's Bill of Complaint, and under the said circumstances, and that the payment for the same was made by the said Roy C. Lammers in behalf of said complainant, and the deeds therefor placed of record as set forth therein. The said defendants reserving only all objections as to materiality and relevancy.

The object of this stipulation is to avoid the necessity of complainant's taking proof upon said matters and things, and to enable the said complainant to



submit its cause upon its Bill of Complaint, and upon the admissions made in the said Answers, and this stipulation, without any waiver, however, upon the part of the said defendants to argue as a matter of law the legal effect of their said denials contained in their said Answers, and also without waiving any rights which the said defendants Lundquist and Lindquist may have to continue said action for damages, [198] or to institute other and further actions for damages, which might lie in their behalf.

Dated this 26th day of April, A. D. 1913.

Signed: F. M. DUDLEY,

CULLEN, LEE & HINDMAN,

Attorneys for Complainant.

FORNEY & MOORE,

Attorneys for Defendants, Kinsolving and Milwaukee Lumber Co.

A. G. ELSTON,

Attorney for Lundquist and Lindquist."

*"In the District Court of the United States for the  
District of Idaho, Northern Division.*

McGOLDRICK LUMBER COMPANY,

Complainant,

vs.

CHARLES J. KINSOLVING et al.,

Defendants.

**Stipulation [Re Trial of Cause, etc.].**

WHEREAS, part of the testimony for complainant has been taken in this case, and whereas the further taking of testimony was continued because of the illness of one Herrick, an officer of the Milwau-

kee Lumber Company, one of the defendants, and whereas the further taking of testimony has been continued by consent of counsel:

NOW, THEREFORE, it is agreed between the parties that the said case shall be tried before the Court at the next regular term of the above court at Coeur d'Alene, [199] Idaho, upon the testimony heretofore taken by the complainant and such other testimony as it may desire, and upon the testimony of the defendants.

Signed: W. E. CULLEN,  
F. M. DUDLEY,  
JOHN P. GRAY,  
Attorneys for Complainant.  
FORNEY & MOORE,  
Attorneys for Defendants."

Whereupon an agreement between the Milwaukee Lumber Company and Charles H. Kinsolving was marked Plaintiff's Exhibit No. 1, offered and received in evidence.

**[Testimony of W. H. Batting, for Plaintiff.]**

W. H. BATTING, a witness called and sworn on behalf of plaintiff, testified as follows:

Direct Examination by Mr. GRAY.

My name is W. H. Batting. I reside at Coeur d'Alene, Idaho, and I am Register of the United States Land Office and have charge of the original records of that office. I have the tract-book and serial register from among my office records here. The tract-book shows applications made for public lands in this district, together with a serial number

(Testimony of W. H. Batting.)

for each selection. The serial register shows that the S.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  and the SW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  and the NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Section 9, Township 44 North, Range 3 E., B. M., was filed on by the Santa Fe Pacific Railway Company October 25, 1910, as a lieu selection, serial number 06636, in lieu of lands in Arizona patented March 22, 1911, and also shows the number of the patent. The serial register number 06636 shows that the Santa Fe Pacific Railway Company, by [200] Charles J. Kinsolving, attorney in fact, of St. Maries, Idaho, filed this lieu selection under the Act of June 4, 1897, for the same land, shows the date of filing, and the history of the case and the date of patent; filed October 25th, 1910, on which date notice was issued for publication to the "Santa Times," I think December 10, 1910, as the date for final proof. The selection was transmitted to the general land office with the returns for October, 1910. December 13, 1910, proof of posting and publication was filed. Certificate of posting in the land office was issued. February 11, 1911, the foregoing papers were transmitted to the general land office. On March 7, 1911, by letter K, the commissioner of the general land office approved the selection. March 27, 1911, patent No. 186176, issued. June 15, 1911, this patent was delivered to C. J. Kinsolving.

Whereupon a quitclaim deed from the Santa Fe Pacific Railroad Company by C. J. Kinsolving, its attorney in fact, to Milwaukee Lumber Company was marked Plaintiff's Exhibit No. 2, offered and

(Testimony of W. H. Batting.)

received in evidence.

Whereupon the powers of attorney from the Santa Fe Pacific Railroad Company to C. J. Kinsolving were marked Plaintiff's Exhibits 3 and 4 were offered and received in evidence, and patent from the United States to the Santa Fe Pacific Railroad Company was marked Plaintiff's Exhibit No. 5, offered and received in evidence. Copies of which said exhibit are attached hereto. [201]

Cross-examination by Mr. MOORE.

Some of the entries are abbreviated in the books and where they were I have explained them more fully. I have stated all of the records pertaining to the proceedings upon which the patent was issued except the base of the lieu selection in Arizona. The patent, exhibit 5, does not show the description of the base land. My records merely refer to the base as within Section 25, Township 18 North, Range 5 East, Arizona. The powers of attorney, exhibits 3 and 4, do show the base. The serial register shows that the act under which the selection was made was Forest Lieu Selection Act. Witness excused.

**[Testimony of W. E. Cullen, for Plaintiff.]**

W. E. CULLEN, a witness called and sworn on behalf of plaintiff, testified as follows:

Direct Examination by Mr. GRAY.

My name is W. E. Cullen; I reside at Spokane, Washington; I am an attorney at law; I am one of the attorneys for McGoldrick Lumber Company and have been for several years. I was one of the attorneys in the contest referred to subsequent to the issu-



(Testimony of W. E. Cullen.)

ance of patent. I am acquainted with A. V. Braderick, one of the officers of the Milwaukee Lumber Company. I had a conversation with Mr. Braderick with reference to the conveyance by Kinsolving, either individually or as attorney in fact of the lands referred to in the complaint; that conversation with Mr. Braderick concerning this land was last May or June in Coeur d'Alene. I think Mr. Braderick was Secretary and Manager of the Milwaukee Lumber Company. My information concerning his connection with the company is that [202] I have seen letters signed by him and also deeds and other documents. The appellation was Secretary and Manager. The conversation was I simply inquired generally of Mr. Braderick whether he knew of the claim of the McGoldrick Lumber Company to this property. He stated that he did, that he had examined into it before the purchase was made and had caused an examination to be made of the records, something like that.

Cross-examination by Mr. MOORE.

That conversation which I narrated took place sometime last May or June in Coeur d'Alene. I think Mr. Braderick was here to testify in this case; it was the time we appeared here to take the testimony before the referee. At the time we signed this stipulation we made an application for a continuance sometime about May first or subsequent. My memory is uncertain whether we came back here again or not. He said he knew of the existence of the claim of the McGoldrick Lumber Company before he

(Testimony of W. E. Cullen.)

made the purchase. I talked to him very briefly. I was going to call him as a witness. I asked him a leading question or two to which he replied. I have had to some extent the local management of this case. I did not subpoena him as a witness, if Mr. Gray has, we have acted jointly in the matter.

Mr. GRAY.—I will say that the records show that I have issued a subpoena and can't find him.

The witness thereupon proceeded: He was here the other day when we were ready for trial. Mr. Gray attended to the issuance of the subpoenas for the present hearing. I told Mr. Gray that Mr. Braderrick made these statements [203] to me some months ago. I think I said I had some conversation with Mr. Herrick; my recollection as to that is somewhat uncertain because it was a general conversation with Mr. Herrick. I told Mr. Gray to subpoena Mr. Herrick and Mr. Norris. I think I said to subpoena Mr. Braderick; I think I said to subpoena whoever was in charge of the Milwaukee Lumber Company.

Redirect Examination by Mr. GRAY.

I left the entire matter of subpoenaing witnesses to Mr. Gray; I talked to Mr. Norris about the same time. We may have been all standing around together, but my recollection is that the talks which I had were probably different, and may not have been overheard by anyone, or may have been overheard; I wasn't attempting to conceal it in any way. Mr. Norris is one of the attorneys for the Milwaukee Lumber Company, one of those appearing here.

Witness excused.

Mr. GRAY.—Now, Mr. Moore, it is understood that there is no question but that the McGoldrick Lumber Company purchased the original claim of Shannon.

Mr. MOORE.—Yes, we have a written stipulation here that all exhibits attached to the bill of complaint, and those filed after the bill was filed, are all to be considered true and correct copies of the exhibits filed in the contest in the land office, and may be used as exhibits in this suit.

Mr. GRAY.—One other thing I ask for the purpose of saving the record, is to show that they have never parted with the title which the McGoldrick Lumber Company acquired. I mean they have not conveyed it away, and still have whatever rights they acquired.

Mr. MOORE.—I will admit that they have never [204] executed any conveyance transferring any interest they might have.

Mr. MOORE.—But I wouldn't want to admit that the receipt for the entry hadn't been cancelled.

Whereupon there was introduced in evidence the two exhibits originally filed in the contest case between C. J. Kinsolving vs. John Shannon and in said proceeding marked Exhibits "F" and "G," which said exhibits were thereupon marked Plaintiff's Exhibits 6 and 7, offered and received in evidence.

Mr. GRAY.—That is all; we will rest with the understanding that we will submit this letter, Exhibit "I," when we get it.

Complainant rests.

DEFENDANTS' CASE.

[**Testimony of E. B. Caple, for Defendants.**]

E. B. CAPLE, a witness called and sworn on behalf of the defendants, testified as follows:

Direct Examination by Mr. MOORE.

My name is E. B. Caple; I am forty years old and reside seven miles south of Coeur d'Alene. I have been a resident of Kootenai County fourteen months, and have been in Idaho ten years. I was acquainted with a man by the name of John Shannon during my residence in Idaho. I knew him in Kootenai County six or seven years ago. At that time I was special agent for the general land office. [205] I have knowledge of the application of John Shannon to purchase land under the timber and stone act. I know the section and range. I don't know the legal subdivision of his selection. It was section 39, township 44 north, range 3.

Q. Now, did you ever have a conversation with Mr. Shannon about his application for the purchase of that land?

Mr. GRAY.—I object to that as incompetent, irrelevant and immaterial and hearsay, and not within the issues in that case.

Here followed argument by respective counsel.

The COURT.—It is not clear to me just what course should be taken in this case, Gentlemen. The general principles are clear, but their application to a case of this character is not free from doubt. We have cases of this character, for instance, where a man enters upon land as a homestead, and before the



(Testimony of E. B. Caple.)

requisite period of residence has expired the officers of the Land Department issue a patent to some third person, which it is claimed by the homestead entryman is in violation of his rights. I think the rule undoubtedly is, in a case of that kind, that it isn't sufficient for the homestead entryman as claimant in a court of equity, seeking to charge the patentee with a trust, as in this case, to show that the patent was wrongfully issued, through error of law on the part of the officers of the Land Department, but the plaintiff in such case must go further and show that he is rightfully entitled to the patent, as a matter of fact. That is, he must [206] show compliance with the homestead laws under which he claims the right to patent, and upon which such claim is based, and if he fails it becomes in that respect unimportant to inquire whether or not the patent was wrongfully issued. We had some cases tried here,—perhaps it was at the last term of court—in which that precise question arose, tried by able counsel, and as I remember both sides conceded such to be the rule, and proof was offered in accordance therewith. Now, in this case the plaintiff comes into court and alleges, must necessarily allege, that it was entitled to patent it, or its predecessors in interest was entitled to patent, but that in violation of such a right the officers of the Interior Department or Land Department have issued patents to the defendant. I have forgotten the exact condition of the record here, but I assume that counsel for the plaintiff claim that the record in the land office itself shows a *prima facie*

(Testimony of E. B. Caple.)

right to receive the patent. In other words, that certain presumptions arise from the proceeding taken in the Land Department. Was a final receipt issued?

Mr. GRAY.—Yes, sir.

The COURT.—In other words, the final receipt was issued, and that therefore the plaintiff is relieved of the burden of showing that it was entitled to patent,—in other words, that the final receipt itself is presumptive evidence of the right now claimed, so that the question here and now really is as to whether or not this presumption, on the case so made, can be overthrown by testimony of the character now offered. [207]

Mr. MOORE.—May I say just one word?

The COURT.—Yes.

Mr. MOORE.—I feel this, that your Honor mis-spoke yourself in saying that what we call the final certificate of evidence that he was entitled to patent. certificate was evidence that he was entitled to patent. so contends.

Mr. MOORE.—Oh, I beg pardon.

The COURT.—Is not that your contention, gentlemen?

Mr. GRAY.—Yes, sir.

The COURT.—In other words, you allege that you are entitled to patent?

Mr. GRAY.—That we would have received it except for this certificate of the Land Department.

The COURT.—You have made no proof of your right except,—

(Testimony of E. B. Caple.)

Mr. GRAY.—As disclosed by the land office records.

The COURT.—And I assume that their contention was their right to a patent was shown *prima facie* by the final certificate, which is ordinarily true.

Mr. MOORE.—That has, as a proposition of law, been discussed by both the Circuit Court of Appeals of this Circuit, and in the Eighth Circuit, and also by the Supreme Court of the United States. Now, that certificate is *prima facie* evidence of the right of the entryman to a patent only when he has complied with the law, and as between him and the Commissioner of the General Land Office who issues the patent. After it has been cancelled, it is evidence of nothing. [208]

The COURT.—That is true, but here it is contended that it has not in law been cancelled that while in form it has been cancelled, the action of the Interior Department in cancelling it was without authority of law, and hence void, and hence of no effect at all, and that therefore the certificate still stands. I assume that to be the course of reasoning.

Mr. MOORE.—That hasn't been the practice followed by the courts. That certificate never is reinstated, but the patentee, under another or different certificate, recognized by the Commissioner of the General Land Office, is made Trustee of the title. The cancelled certificate is never revived by any action of the court at all. The legal title has passed from the Government by virtue of the patent, and the patentee is declared to be the trustee.

(Testimony of E. B. Caple.)

The COURT.—I think I shall let you introduce the evidence, and I will consider later the question as to whether or not it shall be given any effect.

Mr. GRAY.—We have exceptions to all adverse rulings?

The COURT.—Yes.

(Last question read.)

A. Yes.

WHEREUPON the witness proceeded: That statement was reduced to writing. (A certain document was thereupon marked Defendant's Exhibit I.) The witness then proceeded: This paper marked Exhibit I is that written statement of Mr. Shannon. I saw Mr. Shannon sign it. I swore him to it. At that time, I was occupying the position of special agent of the General Land Office. I was getting evidence to cancel the entry for the General [209] Land Office. The last time I saw Mr. Shannon was the day I took that affidavit; I have made search for him. I have looked for him in Coeur d'Alene and inquired for him at some logging camps. I do not know where he is at the present time.

Mr. MOORE.—We offer this statement in evidence, if your Honor please.

Mr. GRAY.—We object to it upon the ground that it is incompetent, irrelevant, and immaterial, that it is hearsay, that it bears upon its face,—that it shows upon its face that it was made at a time subsequent to the time when he had conveyed the property, and therefore would not be binding upon the plaintiff in this case.



(Testimony of E. B. Caple.)

Mr. DUDLEY.—Over sixty days after the title passed from Shannon. It would not be admissible as a declaration against interest, because it appears that at the time this instrument was given Mr. Shannon had no interest in the matter.

The COURT.—I doubt very much whether it is competent, but I shall let it go in with this other proof and consider it all at the same time.

To which ruling complainant excepted and exception was allowed.

Cross-examination by Mr. GRAY.

I was an officer of the United States Government, a special agent of the General Land Office. I got this document which I have presented on the bank of the St. Maries River, while I was in the employ of the United States. I have kept it in my possession at all times since. I didn't transmit it to the Government, when Mr. Kinsolving [210] filed a contest it wasn't of any use to the Government. The contest cancelled the entry, and that is all it was gotten for. I had it in my possession ever since I took it. I exercised my judgment about keeping it or transmitting it to the Department. It was no use transmitting it to the Department after the entry was cancelled. I was not acting for anybody, except for the Government. When I took it, I didn't have any business dealings with Kinsolving at that time. I took this prior to the hearing of the contest; I was present at that hearing; I don't remember when I first advised the defendants here that I had this document. Mr. Kinsolving, I think, spoke some-

(Testimony of E. B. Caple.)

thing to me about it after or before, I don't know which, after or before his contest, I don't remember. I don't remember the date of the contest. I wrote the statement. Mr. Shannon was working in a logging camp and was sober at the time I had him sign it. Further investigation I made after I took the affidavit was to take an affidavit of Billy McCarter and also one from Roy C. Lammers. I did not transmit them to the Government. I did not transmit any of them because the entry was cancelled at a hearing. Contest was filed, it wasn't cancelled, but I gave way for Mr. Kinsolving. Whenever there was a contest filed the Government let the private individual contest the entry. I did not advise Mr. Kinsolving I was waiting until after.

Redirect Examination by Mr. MOORE.

I guess I knew Mr. Kinsolving by sight at the time he filed contest. I found Shannon working in Jack Cox's logging camp on the St. Maries River. He was not [211] right in the camp, he was down at the river doing some work there, and Mr. Babbitt was there with me, and he was out there when I took the statement, and his name is on the statement. He was actually working when I took the statement down there. I took him away from his work.

Witness excused.

**[Testimony of Wm. McCarter, for Defendant.]**

WILLIAM McCARTER, a witness called and sworn on behalf of defendants, testified as follows:

**Direct Examination by Mr. MOORE.**

My name is William McCarter. I reside at St. Maries, and have been a resident of Idaho since 1894, residing at St. Maries most of the time. I was acquainted with a man named John Shannon of Kootenai County.

Q. Were you familiar with the land for which he made homestead entry or upon which he made homestead entry at the Coeur d'Alene United States Land Office, embracing the south half of the northwest quarter, the northeast quarter of the southwest quarter and the southwest quarter of the northeast quarter of section 9, township 44 north, range 3 east?

Mr. GRAY.—I object, if your Honor please. We are not interested in his homestead application. It is not within the issues in this case. This was a timber and stone entry and whatever he may have done concerning some prior entry is immaterial and irrelevant.

The COURT.—Overruled.

Plaintiff excepted, exception allowed.

WITNESS.—I never saw the land before he filed; I was interested in it though. [212]

Q. How were you interested in the land?

Mr. GRAY.—I move to strike that out. I object to that, if the Court please. The plaintiff here does not derive title through Mr. Shannon as a homestead entryman, it was through a timber and stone entry.

(Testimony of William McCarter.)

Whatever may have been the facts with reference to some prior entry of Shannon's, we are not parties to it or bound by it, nor have we anything to do with it.

Objection was overruled; plaintiff excepted, exception allowed.

A. I paid for the location of it.

Q. What did you pay for the location of it?

A. \$250.00.

Mr. GRAY.—That all goes in, if your Honor please, subject to our objection.

The COURT.—Yes, it may all go in subject to your objection.

WITNESS.—I had an understanding or agreement with Shannon which was not in writing right at the time but was put in writing later.

The COURT.—You say that writing is in evidence?

Mr. MOORE.—That writing is in evidence; yes.

WITNESS.—I procured this written agreement of Mr. Shannon, I remember, when he made application to purchase under the timber and stone act. This written agreement was procured before he proved up or was to prove up on his homestead; it was a day before or two days before. I wouldn't be certain which. I had it recorded. I had a conversation about having an interest in the timber and [213] stone claim, that took place at St. Maries and also here. I had a conversation with him before he made the application, that conversation took place at St. Maries. He come to see me about it; he was



(Testimony of William McCarter.)

to give me an undivided one-half interest in it or \$2,000. I had a conversation with Joseph H. Johnson about this agreement with Mr. Shannon. I had a conversation with Mr. Roy C. Lammers in regard to this. I remember the time Mr. Shannon made proof upon his application under the timber and stone act. The night before or the night he proved up on his timber and stone claim I had this conversation with Lammers; that took place on the street down here. I *may* Roy and I says: "You are going to buy the Shannon claim, are you?" And he says, "Yes," and I said, "I filed a contract against that," and he said, "I can't do nothing with that, Billy; our attorneys say it don't amount to nothing," and I walked off and left him.

Cross-examination by Mr. GRAY.

That contract was the one which I had filed in the Recorder's office in Shoshone County. That was what I was claiming; I was claiming my rights which I had, because I had put up my good money for it. I had no agreement other than that one. We reduced our prior agreements to written form and had it recorded. I had subsequent agreements with Shannon. The subsequent agreement with him was about fifteen days after the date I recorded that instrument, I couldn't say exactly the time, it was about fifteen days later, we came to St. Maries and that was the first arrangement we had subsequent to our written arrangement, that was up at St. Maries. I was over here at Coeur d'Alene [214] when he tried to make his homestead entry, and I believe I

(Testimony of William McCarter.)

went back to St. Maries. I couldn't say exactly how long it was after I had this conversation with him, fifteen days or such a matter, but it was somewhere about that time, and it was up at St. Maries. With reference to the time he and I were over here, that was the time he was going to make his homestead proof. He was over here and I came down; it was about fifteen days subsequent to that, somewhere about there; it might have been more, it might have been less, I cannot say for sure, that I had the conversation with him.

Redirect Examination by Mr. MOORE.

The first talk I had with him after this written agreement was when he was turned down here and couldn't make final proof on his homestead.

The COURT.—I think I will ask this question: When did you first have a conversation with Shannon about the matter of entering this land or having entered it as a timber and stone claim?

A. Well, sir, it was the day that he was refused his final proof, or just a day or so later; I couldn't say for sure. I know we went to Spokane from here and back, and I can't recall now whether it was right at that time or right after we got back to St. Maries, but it was the next time I seen him after he had made his final proof, after he had recalled his homestead filing and filed a timber and stone on it, he said Roy Lammers had advised him to take a filing, to file a timber and stone claim on it, and I says to him, I says, "Johnnie, where does that put you and me?" and he [215] says, "It will be

(Testimony of William McCarter.)

just the same, Billy," he says, "It is all right," and I says, "Is Lammers going to carry this thing through with you?" and he says "No."

Witness proceeds: That was the first time an agreement was made that I should have an interest in the timber and stone claim. I was here when he failed to make his commuted homestead proof. I had a conversation with him that day about the timber and stone entry and we went to Spokane that night.

Witness excused.

**[Testimony of Fred Herrick, for Defendant.]**

FRED HERRICK, a witness called and sworn on behalf of the defendants, testified as follows:

Direct Examination by Mr. MOORE.

My name is Fred Herrick; I reside at St. Maries; my business or occupation is lumberman. I am familiar in a general way with land known as the Shannon claim. I remember the time I purchased that land. I transacted the business connected with the purchase of that land on the part of the Milwaukee Lumber Company. I hold the position of President and General Manager of the Milwaukee Lumber Company. I transacted the business with the Santa Fe Pacific Railroad Company through Kinsolving, with power of attorney for the Santa Fe Railroad. I saw the patent to the Santa Fe Railroad, and the powers of attorney of Kinsolving to sell the land, and a telegram from the land office showing that the title of the land was in the Santa Fe Railroad. The telegram was from the recorder's office

(Testimony of Fred Herrick.)

from Wallace, Shoshone County. The telegram was left in our office, and I tried to find it, and have been unable to find it. It was addressed to Lindquist and Lundquist. It [216] said the title was in the Santa Fe Railroad, Santa Fe Pacific or Santa Fe Railroad. At that time I knew nothing about any claim to this land made by the complainant, McGoldrick Lumber Company. I bought the land, or bargained for the land, and left the matter with Mr. Braderick, and told him to close the deal for the land, and a logging contract on the land.

Cross-examination by Mr. GRAY.

I did not have an attorney look after these matters for me at the time. I was acquainted with Mr. Norris at that time but did not ask his opinion or ask him to draw the conveyances for me. Mr. Norris did not tell me of the old contract between Kinsolving and McGoldrick Lumber Company, and did not tell me that because of that fact he did not want to act as attorney in the matter. I had no attorney at all in the matter. I dealt with Kinsolving with power of attorney from the Santa Fe Pacific Railroad Company. I have been engaged in the lumber business three years. I never bought any scrip land before. I knew a great deal of land in the State was scripped. I never filed any myself at any place. I did not know that Kinsolving was the man who got the real consideration for the property. With regard to the purchase money I gave Kinsolving a contract; a copy of that contract is in evidence here, but you have got manager on it; it doesn't belong



(Testimony of Fred Herrick.)

there. Let me read the contract over. (Witness handed Plaintiff's Exhibit 1.) I think this is correct. We have never paid Kinsolving anything on account of this purchase. I am still withholding all the purchase price. When I bought the land, I bought the land, dictated the contract or form that should be given and gave [217] the data to Mr. Braderick, and went away, and I bought in on the strength of that patent, and the power of attorney and that telegram. I went away and went east, and when I came back there had been an injunction or something commenced against Kinsolving and the Milwaukee Lumber Company and I have never made any investigation as to the title. I did nothing more than I have stated. I did not procure an abstract of title or investigate the records at or prior to the time I purchased the land.

Redirect Examination by Mr. MOORE.

The reason I haven't paid Kinsolving anything under that contract is that before the time the first payment became due there had been a suit and an action started censuring us, Kinsolving and the Milwaukee Lumber Company, with conspiracy, and if we paid the money to Kinsolving, it would be left on our shoulders to fight the conspiracy case, and by holding back the money it would help keep Kinsolving in line to fight this case. I do not know where Mr. Braderick is at this time, I called up our office but they did not know where he was. He went away on business. He went to Spokane and different places looking to buy lumber and sell lumber.

Witness excused.

**[Testimony of A. L. Richardson, for Defendants.]**

A. L. RICHARDSON, a witness called and sworn on behalf of defendants, testified as follows:

Direct Examination by Mr. MOORE.

I am Clerk of this court. I keep a record of subpoenas issued in civil cases. Subpoenas were issued on Mr. Herrick and Mr. Norris on November 7th. Subpoena issued on Mr. Braderick on December 1st.  
[218]

**[Testimony of William Schuldt, for Defendants.]**

WILLIAM SCHULDT, a witness called and sworn on behalf of defendants, testified as follows:

Direct Examination by Mr. MOORE.

I am deputy United States Marshal. I received a subpoena for A. V. Braderick in this case yesterday morning. I telephoned St. Maries to locate him, and made inquiries of Mr. Herrick here. I reported my failure to get Mr. Braderick to Mr. McCarthy who handed me the subpoena, Mr. McCarthy of Mr. Gray's office. The date of the subpoena for Mr. Braderick is December 1st. I received a subpoena for Mr. Norris and Mr. Herrick; that has been returned.

Cross-examination by Mr. GRAY.

I could have gone on the boat yesterday noon and served Mr. Braderick yesterday if he had been in St. Maries.

Redirect Examination by Mr. MOORE.

I served Mr. Norris and Mr. Herrick on the 21st of November, 1913.

## REBUTTAL.

[**Testimony of Roy C. Lammers, for Plaintiff (in Rebuttal).**]

ROY C. LAMMERS, a witness called and sworn on behalf of plaintiff, in rebuttal, testified as follows:

Direct Examination by Mr. GRAY.

My name is Roy C. Lammers; I reside at Spokane, Washington; I am engaged in the lumber business. I am superintendent of the woods department of the McGoldrick Lumber Company, and a stockholder in that company. I was acquainted with John Shannon. The conveyance made by him to me was for the benefit of the McGoldrick Lumber Company. The company furnished the money and I represented the company in the transaction. I do not know where John [219] Shannon is. I have not known for about two years. I have made efforts to locate him, but have not been able to do so. I heard the testimony of Mr. McCarter with reference to a conversation he alleged he had with me after I purchased that land from Shannon. I knew Shannon about a year before I had this conversation with him, and I knew, of course, he had a claim on Marble Creek, and I had my cruisers go over the claim. Mr. McCarter stated to me that he had an interest in the timber and stone claim of Mr. Shannon. He did call my attention to a written agreement. That conversation was just about as he stated it, he said that he had advanced Shannon some money, or Shannon owed him money, and that he had a claim of record showing

(Testimony of Roy C. Lammers.)

an interest in that claim. That was after the time of proof or about the time he made proof. Mr. Dudley was our attorney at that time. We had a copy of the abstract made in Wallace and submitted it to Mr. Dudley. I stated to Mr. McCarter that Mr. Dudley considered his title of no consequence in the case. That was the contract or agreement that was referred to. I had no conversation with McCarter at or about the time Shannon cancelled his homestead entry or about the time I purchased the property. I had nothing whatever to do with any such homestead entry, I did not at any time prior to the time I purchased this claim from Shannon, either individually or for McGoldrick Lumber Company, have any interest whatever therein, nor did I furnish any money therefor.

Cross-examination by Mr. MOORE.

Before we purchased this land we had an abstract of title showing the Shannon-McCarter agreements and submitted [220] it to Mr. Dudley.

Whereupon both parties rested subject to the furnishing of the Exhibit I referred to in the testimony in the Land Department, a copy of which, together with the other exhibits in the case, is attached to this statement of evidence, and a copy of which said exhibit was delivered to and served upon the attorneys for the defendants.

IT IS HEREBY CERTIFIED that the foregoing transcript is a full, true and correct transcript of the testimony and proceedings had upon the trial of the above-entitled action; that said transcript contains



all of the evidence and all proceedings had upon the trial of said action, and the exhibits produced on the trial and Exhibit I referred to during the trial and the same may be approved and allowed, by the Judge of the above-entitled court.

CULLEN, LEE & MATTHEWS,

F. M. DUDLEY,

JOHN P. GRAY,

Attorneys for Plaintiff.

J. H. FORNEY,

FRANK L. MOORE,

Attorneys for Defendants, Kinsolving and Milwaukee Lumber Company.

A. G. ELSTON,

Attorney for Defendants, Lyn Lundquist and Elix Lindquist. [221]

**[Certificate Re Statement of Evidence.]**

United States of America,

District of Idaho,—ss.

The undersigned Judge of the District Court of the United States for the District of Idaho, Northern Division, being the Judge who tried the above-entitled action, does hereby certify that the foregoing statement contains, in substance, all of the evidence introduced upon the trial of said action, except the exhibits attached to the complaint and made a part of the record by stipulation, and also contains in substance all proceedings had on the trial of said action, and the same is hereby approved and allowed and is deemed adequate to present for review any ruling appearing thereon to have been excepted to by or

deemed excepted to on appeal.

Dated this 5th day of May, 1914.

FRANK S. DIETRICH,

District Judge. [222]

**Plaintiff's Exhibit No. 1 [Agreement, Dated September 27, 1911, Milwaukee Lumber Co. and C. J. Kinsolving].**

THIS AGREEMENT, made and entered into this 27th day of September, A. D. 1911, by and between the Milwaukee Lumber Company, a corporation, of the first part, and C. J. Kinsolving of the second part, witnesseth:

That whereas, the party of the second part has this day conveyed, as attorney in fact for the Santa Fe Railroad Company to first party the following described land, to wit: The south half of the Northwest quarter, the Southwest quarter of the Northeast quarter, and the Northeast quarter of the Southwest quarter, of Section Nine in Township Forty-four North of Range Three East of the Boise Meridian, Idaho, containing one hundred and sixty acres, more or less, at the agreed price of Twelve Thousand Dollars. It is understood and agreed between the parties hereto, and the first party hereby agrees and binds itself to pay to the second party the said Twelve Thousand Dollars, as follows, to wit: One Thousand Dollars to be paid to the order of said second party, on or before November 1st, 1911; Two Thousand Five Hundred Dollars to be paid to the order of said second party, on or before January 1st, 1912, and the balance of said Twelve Thousand Dollars to be paid to the order of said second party, on

or before July 1st, 1912.

It is further understood and agreed between the parties hereto, that in case the sum of Four Dollars per Thousand feet deducted from the amount to be advanced to Lindquist & Lundquist upon their logging contract in relation to this land, exceeds the sum mentioned to be [223] paid to second party, or his order, on the dates mentioned herein, at such time then, and in that event, the full sum then in the hands of first party by reason of retaining said Four Dollars per thousand feet shall be paid to the second party or his order, in lieu of sums mentioned to be paid to him or his order in lieu of sums mentioned to be paid to him or his order on the various dates mentioned until the full sum of Twelve Thousand Dollars is paid off and discharged; which said sum of Twelve Thousand Dollars the first party agrees and binds itself to pay to second party according to the terms and conditions of this contract.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be signed, sealed and delivered the day and date as above written.

(Signed) MILWAUKEE LUMBER COMPANY,

By A. V. BRADERICK,  
Secretary and Manager.

(Signed) C. J. KINSOLVING.

Attest: E. B. FLAGG. [224]

**Plaintiff's Exhibit No. 2 [Agreement, September 15, 1911, Santa Fe Pacific R. R. Co. and Milwaukee Lumber Co.].**

THIS INDENTURE, Made the 15th day of Sep-

tember, in the year of our Lord One Thousand Nine Hundred and Eleven BETWEEN Santa Fe Pacific Railroad Company, a corporation duly incorporated under an Act of Congress approved March 3d, 1897, by C. J. Kinsolving, its attorney in fact of St. Maries, Kootenai County, State of Idaho, party of the first part and the Milwaukee Lumber Company, a corporation.

WITNESSETH: That the said party of the first part, for and in consideration of the sum of Twelve Thousand (\$12,000.00) Dollars, lawful money of the United States of America, to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents demise, release and forever quitclaim unto the said party of the second part, and to its successors, heirs and assigns forever all that certain lot, piece or parcel of land, situated in the said Shoshone County of State of Idaho and bounded and particularly described as follows, to wit: The south half of the northwest quarter, the southwest quarter of the northeast quarter, and the northeast quarter of the southwest quarter, of Section Nine in Township Forty-four, North of Range Three East of the Boise Meridian, Idaho, containing one hundred and sixty acres, more or less.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

TO HAVE AND TO HOLD ALL and singular



the said premises, together with the appurtenances unto the said party of [225] the second part, and to its successors, heirs and assigns forever.

IN WITNESS WHEREOF, The said party of the first part has hereunto set its hand and seal the day and year first above written.

SANTA FE PACIFIC RAILROAD COMPANY. (Seal)

By C. J. KINSOLVING, (Seal)

Its Attorney in Fact.

Signed, sealed and delivered in presence of

E. B. FLAGG.

M. C. PETERSEN.

State of Idaho,

County of Kootenai,—ss.

On this 27th day of September, in the year A. D. 1911, before me M. C. Petersen, a Notary Public, in and for said County and State, personally appeared C. J. Kinsolving, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Santa Fe Pacific Railway Company and acknowledged to me that he subscribed the name of said Railroad Company thereto as principal and his own name as attorney in fact.

[Notarial Seal]

M. C. PETERSEN,

Notary Public in and for said County and State.

[Endorsed]: 26341. Quitclaim Deed. Santa Fe Pacific Railroad Company To Milwaukee Lumber Co. State of Idaho, County of Shoshone,—ss. Filed for Record at the Request of Milwaukee Lumber Co. on the 29th day of September, 1911, at 2 o'clock P. M.,

and Recorded in Book 42 of Deeds on Page 149.  
John P. Sheehy, County Recorder. [226]

**Plaintiff's Exhibit No. 3 [Power of Attorney, Santa Fe Pacific R. R. Co. to C. J. Kinsolving, January 10, 1906].**

**POWER OF ATTORNEY TO CONVEY LIEU  
LANDS.**

KNOW ALL MEN BY THESE PRESENTS,  
That WHEREAS, The Santa Fe Pacific Railroad Company, a corporation duly incorporated under an Act of Congress approved March 3, 1897, has relinquished to the United States of America, under the Acts of June 4, 1897, and June 6, 1900, the following described lands located within the San Francisco Mountains Forest Reserve, Territory of Arizona, to wit:

The North Half of the Southeast quarter of Section twenty-five, township eighteen north, Range five east, of the Gila and Salt River Base and Meridian, Arizona, containing eighty acres more or less; and

WHEREAS, The Santa Fe Pacific Railroad Company is entitled to select, in lieu of the lands so relinquished to the United States, a like quantity of vacant, *surveyed*, nonmineral public lands of the United States which are subject to homestead entry;

NOW, THEREFORE, The Santa Fe Pacific Railroad Company has made, constituted and appointed C. J. Kinsolving its true and lawful agent and attorney, for it, and in its name, place and stead, to convey by quitclaim deed all the right, title, interest and claim which the Santa Fe Pacific Railroad Company

has, or may hereafter acquire, in the lands so selected or located by said Santa Fe Pacific Railroad Company, or its duly appointed attorney in fact, in lieu of the above described tract or tracts of land relinquished as aforesaid, in whole or in part, to the full amount of the land so relinquished, as such selection shall have been [227] actually made at the United States District Land Office and which shall appear described upon the public records in the office of the Commissioner of the General Land Office of the United States at Washington, D. C., as the lieu lands so selected.

GIVING AND GRANTING unto the said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in the above premises, as fully to all intents and purposes as it might or could do if personally present, hereby ratifying and confirming all that its said attorney shall lawfully do or cause to be done by virtue of these presents.

And the said Santa Fe Pacific Railroad Company to any grantee in any conveyance executed by said attorney hereby gives notice that said attorney hereunder has authority to convey, in whole or in part, only the lands actually selected in lieu of the premises hereinabove specifically described as such lands shall appear described upon the public records in the office of the Commissioner of the General Land Office of the United States at Washington, D. C., and any substantial variance between the description of the lieu lands so selected, as the same shall appear described upon such public records, and the premises

conveyed by said attorney as such lieu lands, shall render any conveyance of the latter hereunder void.

IN WITNESS WHEREOF, The Santa Fe Pacific Railroad Company has caused this instrument to be signed by its President and attested by its Assistant Secretary with its seal this 10th day of January, A. D. 1906.

SANTA FE PACIFIC RAILROAD COMPANY.

By E. P. RIPLEY,  
President.

(Seal) Attest: E. L. COPELAND,  
Assistant Secretary.

Signed, sealed and delivered in presence of  
E. J. ENGLE,  
E. C. HALL,

Witnesses. [228]

State of Illinois,  
County of Cook,—ss.

On this 10th day of January, A. D. 1906, before me, Edward J. Engle, a Notary Public in and for said County and State, personally appeared E. P. Ripley, to me personally known to be the President of the Santa Fe Pacific Railroad Company, and who as such President executed the within instrument on behalf of the corporation therein named; and the said E. P. Ripley being by me duly sworn, did say that he is the President of said Santa Fe Pacific Railroad Company, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors;



and the said E. P. Ripley acknowledged to me that such corporation executed the same, and said instrument to be the free act and deed of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Notarial Seal, the day and year above written.

[Notarial Seal]

EDWARD J. ENGLE,  
Notary Public.

My Commission expires April 17, 1909.

[Endorsed]: 26338. Power of Attorney to Convey Lieu Lands. Santa Fe Pacific Railroad Company to C. J. Kinsolving. Dated Jan. 10, 1906. Recorded at the Request of Milwaukee Lumber Co. Sep. 29, 1911, at 2 o'clock P. M., in Book "F" of Powers of Atty., Page 496, Records of Shoshone County, State of Idaho. John P. Sheehy, County Recorder. [229]

**Plaintiff's Exhibit No. 4 [Power of Attorney, Santa Fe Pacific R. R. Co. to C. J. Kinsolving, January 10, 1906.]**

**POWER OF ATTORNEY TO CONVEY LIEU  
LANDS.**

KNOW ALL MEN BY THESE PRESENTS, THAT WHEREAS, The Santa Fe Pacific Railroad Company, a corporation duly incorporated under an Act of Congress approved March 3, 1897, has relinquished to the United States of America, under the Acts of June 4, 1897, and June 6, 1900, the following described lands located within the San Francisco Mountains Forest Reserve, Territory of Arizona, to wit:

The North half of the Southwest quarter of Section twenty-five, township eighteen north, Range Five East of the Gila and Salt River base and Meridian, Arizona, containing eighty acres more or less; and

WHEREAS, The Santa Fe Pacific Railroad Company is entitled to select, in lieu of the lands so relinquished to the United States, a like quantity of vacant, surveyed, nonmineral public lands of the United States which are subject to homestead entry;

NOW, THEREFORE, The Santa Fe Pacific Railroad Company has made, constituted and appointed C. J. Kinsolving its true and lawful agent and attorney, for it, and in its name, place and stead, to convey by quitclaim deed all the right, title, interest and claim which the Santa Fe Pacific Railroad Company has, or may hereafter acquire, in the lands so selected or located by said Santa Fe Pacific Railroad Company, or its duly appointed attorney in fact, in lieu of the above described tract or tracts of land relinquished as aforesaid, in whole or in part, to the full amount of [230] the land so relinquished, as such selections shall have been actually made at the United States District Land Office and which shall appear described upon the public records in the office of the Commissioner of the General Land Office of the United States at Washington, D. C., as the lieu lands so selected.

GIVING AND GRANTING unto the said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in the above premises, as fully

to all intents and purposes as it might or could do if personally present, hereby ratifying and confirming all that its said attorney shall lawfully do or cause to be done by virtue of these presents.

And the said Santa Fe Pacific Railroad Company to any grantee in any conveyance executed by said attorney hereby gives notice that said attorney hereunder has authority to convey, in whole or in part, only the lands actually selected in lieu of the premises hereinabove specifically described as such lands shall appear described upon the public records in the office of the Commissioner of the General Land Office of the United States at Washington, D. C., and any substantial variance between the description of the lieu lands so selected, as the same shall appear described upon such public records, and the premises conveyed by said attorney as such lieu lands, shall render any conveyance of the latter hereunder void.

IN WITNESS WHEREOF, The Santa Fe Pacific Railroad Company has caused this instrument to be signed by its President and attested by its Assistant Secretary with its seal this 10th day of January, A. D. 1906. [231]

SANTA FE PACIFIC RAILROAD COMPANY.

By E. P. RIPLEY,  
President.

(Seal)                      Attest: E. L. COPELAND,  
Assistant Secretary.

Signed, sealed and delivered in presence of

E. J. ENGLE,

E. C. HALL,

Witnesses. [232]

State of Illinois,  
County of Cook,—ss.

On this 10th day of January, A. D. 1906, before me, Edward J. Engle, a Notary Public in and for said County and State, personally appeared E. P. Ripley, to me personally known to be the President of the Santa Fe Pacific Railroad Company, and who as such President executed the within instrument on behalf of the corporation therein named; and the said E. P. Ripley, being by me duly sworn, did say that he is the President of said Santa Fe Pacific Railroad Company, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors; and the said E. P. Ripley acknowledged to me that such corporation executed the same, and said instrument to be the free act and deed of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Notarial Seal, the day and year above written.

[Notarial Seal]

EDWARD J. ENGLE,  
Notary Public.

My Commission expires April 17, 1909.

[Endorsed]: 26339. Power of Attorney to Convey Lieu Lands. Santa Fe Pacific Railroad Company to C. J. Kinsolving. Dated Jan. 10, 1906. Recorded at the Request of Milwaukee Lumber Co., Sep. 29, 1911, at 2 o'clock P. M., in Book "F" of Powers of Atty., Page 497. Records of Shoshone



County, State of Idaho. John P. Sheehy, County Recorder. [233]

**Plaintiff's Exhibit No. 5 [U. S. Patent to Santa Fe Pacific R. R. Co., March 27, 1911].**

Coeur d'Alene, 06636.

**THE UNITED STATES OF AMERICA,**

To all whom these presents shall come, GREETING:

WHEREAS, The Santa Fe Pacific Railroad Company, being the owner of a tract of land situated and included within the limits of a public forest reservation, known and officially designated as the San Francisco Mountains Forest Reserve, Arizona, has, under the provisions of the Act Approved June 4, 1897, entitled "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-seven, and for other purposes," reconveyed and relinquished the said tract to the United States and has, under the provisions of said act, selected in lieu thereof the following described tract of vacant public land now open to settlement, to wit:

The South half of the Northwest quarter, the Southwest quarter of the Northeast quarter, and the Northeast quarter of the Southwest quarter of Section nine in township forty-four north of range three east of the Boise Meridian, Idaho, containing one hundred sixty acres;

NOW KNOW YE, That the United States of America, in consideration of the premises, has given and granted, and by these presents does give and grant, unto the said Santa Fe Pacific Railroad Com-

pany, and to its successors, the lands above described; to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature thereunto belonging, unto the said Santa Fe Pacific Railroad Company, and to its successors and [234] assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws and decisions of courts, and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

In Testimony Whereof, I, WILLIAM H. TAFT, President of the United States of America, have caused these *latters* to be made Patent, and the seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the twenty-seventh day of March, in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States the one hundred and thirty-fifth.

By the President: WM. H. TAFT,  
By M. P. LE RAY,  
Secretary.

H. W. SANFORD,

Recorder of the General Land Office.

RECORDED: Patent Number 186176.

[Endorsed]: 26340. U. S. Patent to Santa Fe Pacific Railroad Company. S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$

NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  of Sec. 9, Tp. 44, N. R. 3 E., B. M., 160 acres. Recorded at the request of Milwaukee Lumber Co. Sep. 29, 1911, at 2 o'clock P. M. in Book "42" of Deeds, page 148, Records of Shoshone County, State of Idaho. John H. Sheehy, County Recorder.

Received April 5, 1911. U. S. Land Office, Coeur d'Alene, Idaho. [235]

**Plaintiff's Exhibit No. 6 [Sworn Statement of John Shannon].**

**TIMBER AND STONE LANDS—SWORN  
STATEMENT.**

**LAND OFFICE AT COEUR D'ALENE, IDAHO.**

Sept. 26, 1906.

I, John Shannon, of St. Joe, County of Kootenai, State of Idaho, desiring to avail myself of the provisions of the act of Congress of June 3, 1878, entitled "An Act for the sale of timber lands in the States of California, Oregon, Nevada, and in Washington Territory," as extended to all the Public Land States by Act of August 4, 1892, for the purchase of the S.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$ ; SW.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$ ; NE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  of Section 9, Township 44, N. of Range 3 E., B. M., in the district of lands subject to sale at Coeur d'Alene, Idaho, do solemnly swear that I am a native citizen of the United States, of the age of 40 years, and by occupation—woodman; that I have personally examined said land, and from my personal knowledge state that said land, is unfit for cultivation, and valuable chiefly for its timber; that it is uninhabited; that it contains no mining or other im-

provements, nor, as I verily believe, any valuable deposit of gold, silver, cinnabar, copper, or coal; that I have made no other applications under said acts; that I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit, and that I have not directly or indirectly, made any agreement or contract, or in any way or manner, with any person or persons whomsoever, by which the title I may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except [236] myself, and that my postoffice address is St. Joe, Idaho.

JOHN SHANNON.

I hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known (or has been satisfactorily identified before me by ——), and that I verily believe him to be the person he represents himself to be; and that this affidavit was subscribed and sworn to before me this 26th day of Sept. 1906.

R. N. DUNN,  
Register. [237]

**[Testimony of John Shannon in Support of  
Application for Timber Land.]**

**TIMBER AND STONE LANDS.**

**TESTIMONY OF CLAIMANT.**

JOHN SHANNON, being called as a witness in support of his application to purchase the S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Section 9,



Township 44 N., Range 3 E., B. M., testified as follows:

Ques. 1. What is your age, postoffice address, and where do you live?

Ans. Age 40 years; St. Joe, Idaho, where I live.

Ques. 2. Are you a native born citizen of the United States; and if so, in what State or Territory were you born?

Ans. Yes. Born in Holton, State of Idaho.

Ques. 3. Are you the identical person who applied to purchase this land on the 26th day of September, 1906?

Ans. Yes.

Ques. 4. Are you acquainted with the land above described by personal inspection of each of its smallest legal subdivisions?

Ans. Yes, sir, all over it thoroughly.

Ques. 5. When and in what manner was such inspection made?

Ans. About 15 or 16 days ago. I examined it thoroughly on foot.

Ques. 6. Is the land occupied; or are there any improvements on it not made for ditch or canal purposes, or which were not made by or do not belong to you?

Ans. No, there are no improvements. Very little. There is just a cabin on it. That is all the improvements on [238] the land? Yes. Whose cabin is that? It is mine.

Ques. 7. Is the land fit for cultivation, or would it be fit for cultivation if the timber were removed?

Ans. No. If the timber were removed it could

not be cultivated.

Ques. 8. What is the situation of this land, and what is the nature of the soil, and what causes render the land unfit for cultivation?

Ans. It is on top of a hill. It is kind of a hard clay in places, rock to it. What causes render this land unfit for cultivation? I never could raise anything on it, it was too rocky.

Ques. 9. Are there any salines, or indications of deposits of gold, silver, cinnabar, copper, or coal on this land? If so, state what they are, and whether the springs or mineral deposits are valuable.

Ans. No.

Ques. 10. Is the land more valuable for mineral or any other purposes than for the timber or stone thereon, or is it chiefly valuable for timber or stone?

Ans. No. It is valuable chiefly for timber.

Ques. 11. From what facts do you conclude that the land is chiefly valuable for timber or stone?

Ans. Because I don't think it is good for anything else.

Ques. 12. What is the estimated market value of the timber standing upon this land?

Ans. I don't know just exactly how much.

Ques. 13. Have you sold or transferred your claim to this land since making your sworn statement, or have you [239] directly or indirectly made any agreement or contract, in any way or manner, with any person whomsoever, by which the title which you may acquire from the Government of the United States may issue, in whole or in part, to the benefit of any person except yourself?

Ans. No.

Ques. 15. Do you make this entry in good faith for the appropriation of the land exclusively to your own use and not for the use or benefit of any other person?

Ans. Yes.

JOHN SHANNON.

I HEREBY CERTIFY that the above-named John Shannon personally appeared before me; that I verily believe affiant to be the person he represents himself to be; and that each question and answer in the foregoing testimony was read to him in my presence before he signed his name thereto and that the same was subscribed and sworn to before me at Coeur d'Alene, Idaho, this 16th day of January, 1907.

R. N. DUNN,  
Register.

NOTE—Every person answering falsely to the above deposition is guilty of perjury and will be punished as provided by law for such offense. In addition thereto the money that may be paid for the lands is forfeited, and all conveyances of the land or of any right, title or claim thereto are absolutely null and void as against the United States.

I HEREBY CERTIFY THAT I HAVE tested the accuracy of affiant's information and the *bona fides* of this entry [240] by a close and sufficient oral cross-examination of the claimant and his witnesses, directed to ascertain whether the entry is made in good faith for the appropriation of the land to the entryman's own use and not for sale or specu-

lation; and whether he has conveyed the land or his right thereto or agreed to make any such conveyance, or whether he has directly or indirectly entered into any contract or agreement in any manner with any person or persons whomsoever by which the title that may be acquired by the entry shall inure in whole or in part to the benefit of any person or persons except himself, and am satisfied from such examination that the entry is made in good faith for entrymen's own exclusive use and not for sale or speculation, not in the interest nor for the benefit of any other person or persons, firm or corporation.

R. N. DUNN,  
Register. [241]

### TIMBER AND STONE LANDS.

Cross-examination of Claimant in Connection with  
Direct Examination on Form 4-370.

Before taking the testimony the Register and Receiver will read, or cause to be read, to the witness, Section 2392 of the Revised Statutes in regard to perjury see bottom of page on Form 4-371 and see that witness understands same.

Ques. 1. Are you an actual *bona fide* citizen of this State?

Yes.

Ques. 2. Are you married or single?

Single.

Ques. 3. Where did you reside prior to becoming a resident of this State, and what was your occupation?

In Montana. I was contracting, logging, driving, excavating, railroading.



Ques. 4. How long have you been an actual resident of the State, and where have you lived during all of this time?

About 5 years I have lived principally at Coeur d'Alene and the Maries.

Ques. 5. What has been your occupation during the past year and where and by whom have you been employed, and at what compensation?

The last year I have been working in the woods sometimes, not very much. I haven't been doing anything in particular outside of that.

When you haven't been doing anything where have you been?

I have been in the Maries, St. Joe, Coeur d'Alene, and Marble Creek, Idaho.

What were you doing in Marble Creek?

Nothing very particular, just cruising through the country there, looking around.

Ques. 6. How did you first learn about the particular [242] tract of land, and that it would be a good investment to buy it?

About two years ago I was up through there and looked at it myself; I wasn't any ways confident at the time that it was a good investment. About 90 days ago I concluded it was a good investment.

How did you come to that conclusion?

I thought it would be a good fair investment to invest that much at that time.

Ques. 7. Did you pay or agree to pay anything for this information? If so, to whom, and the amount?

No.

Ques. 8. Have you made a personal examination of each smallest subdivision of said land? If so, state when and under what circumstances and with whom.

Yes. I made the examination with both my witnesses about 16 days ago.

Was that the first time you ever examined this land?

I examined it thoroughly several times before that. I simply wanted to find out if this land was good for agricultural or for stone and timber.

Ques. 9. How did you identify this land? Describe it fully. I looked it over, looked at the corner posts. The land slopes to the NW. Timber is white pine.

Ques. 10. How many thousand feet, board measure, of lumber did you estimate that there is on this entire tract, and what is the stumpage value of same?

I would judge there would be about 30,000,000 feet. Stumpage value, that I couldn't say.

Ques. 11. Are you a practical lumberman or woodsman? If not, how did you arrive at your estimate of the quantity and value of the lumber on hand?

Why, yes, sir.

Ques. 12. What do you expect to do with this land and the lumber on it when you get title to it?  
[243]

I haven't got any idea yet.

Ques. 13. Do you know of any capitalist or company which is offering to purchase timber land in the vicinity of this entry? If so, who are they, and how

did you know of them?

No.

Ques. 14. Has any person offered to purchase this land after you acquire title? If so, who, and for what amount.

No.

Ques. 15. Where is the nearest and best market for the timber on this land at the present time?

I would judge the head of navigation.

Ques. 16. Did you pay, out of your own individual funds, all the expenses in connection with making this filing, and so you expect to pay for the land with your own money?

Yes.

Ques. 17. Where did you get the money with which to pay for this land, and how long have you had the same in your actual possession?

I have had it for quite a good long while, I worked for it, earned it in Montana, Washington and Idaho.

Ques. 18. Have you kept a bank account during the past six months, and if so, where?

Yes. In Kalispell, Montana Bank.

JOHN SHANNON.

Sworn to and subscribed before me this 16th day of January, 1907.

R. N. DUNN,

Register. [244]

Witness SHANNON—Further examination.

Q. When you state that you examined this land several times thoroughly for the purpose of determining whether it was valuable chiefly for timber or for agricultural purposes, was that on the occasion

when you were living on the land as a homestead?

A. Yes.

Q. How did you come to get Theriault to act as a witness for you?

A. He had been in that country quite a long while.

Q. Did he ever offer to act as a witness for you?

A. When I asked him he did.

Q. *Have* anyone discussed with you whether you could sell this timber to anyone?

A. Not that I know of.

Q. Has not any person representing any of the timber companies approached you asking for an option or chance to buy this land after you get title to it? A. No.

Q. Do you know any of the men who are buying for any of the timber companies? A. Yes.

Q. State who they are.

A. Not just in there; some people up on the Maries, Davies is about the only man I know of.

Q. Is not Theriault working for the Shevlin Clarke Timber Co.?

A. Not that I know of at all.

Q. Is not Theriault and his brother taking options on lands in that country? [245]

A. Not that I know of.

Q. Do you know Mr. Flaherty, representing the Shevlin Clarke Co.?

A. No, sir, never met him.

Q. Have you not made a verbal agreement to convey this land to the Shevlin Clarke Timber Company when you get title to it? A. No.

Q. Have you not made a verbal agreement to con-



vey one-half interest in this land after you get title to it?     A. No.

Q. How do you explain the fact that it has been reported in this office that you have made a verbal *agreement convey* a half interest in this land after you get title to it?

A. I don't understand it at all.

Q. Have you been introduced to anyone representing any of the timber companies in the last week?

A. In the last week, no, sir, I haven't met any of them at all.

JOHN SHANNON.

Sworn to and subscribed before me this 16th day of January, '07.

R. N. DUNN,  
Register. [246]

**Plaintiff's Exhibit No. 7 [Letter, Roy C. Lammers  
to R. E. McFarland].**

R. E. McFarland,  
Coeur d'Alene, Idaho.

Dear Sir:—

Herewith I hand you affidavit for Mr. McCarter to sign before a Notary. He can then place it in the bank, drawing on me through the Old National Bank of this City, for \$600.00.

Yours truly,  
ROY C. LAMMERS. [247]

**Defendant's Exhibit No. 1 [Affidavit of John Shannon].**

State of Idaho,

County of Kootenai,—ss.

I, John Shannon, being first duly sworn, depose and say that my residence and postoffice is St. Maries, Idaho. That he is the person that made H. E. #4574 for S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 9, T. 44, R. 3 E., B. M., on July 17, '05, and offered commutation proof on same on Sep. 26-06. Said proof was rejected by the officers of the U. S. Land Office and on the same day I relinquished the H. E. and filed a T. & S. Cash Entry on advice of Roy C. Lammers and Joseph H. Johnson of Coeur d'Alene, Idaho. Said Joseph H. Johnson agreed to furnish all the money I needed to file on the land as a T. & S. entry and pay the Government for the land when I would offer proof. I filed on the above land on Sep. 26-06, and the notice was published in the Santa Idaho paper. I went to Coeur d'Alene on the 30th of Dec. 1906,—15 days before I offered proof on the T. & S. entry, and I roomed at Joseph H. Johnson's hotel and saloon. Said Joseph H. Johnson furnished me all the money I wanted with the understanding or agreement that he was to get the land before I made proof on the above T. & S. entry. I made a deed to said Johnson before I offered proof on the above T. & S. and after I offered proof I stayed at Johnson Hotel and on the 25th of April I made a deed to Roy C. Lammers of Spokane and deeded him the above T. & S. entry for consideration

of \$8,000. After I sold, said Lammers gave said Johnson a check for \$2,700.00 and he gave Judge Morgan a check for \$1,000.00 for the purpose of [248] protecting him against the contests that had been filed by John English and Fred Hamilton of Spokane. Also said Lammers checks out \$600.00 to be paid to William McCarter at St. Maries, Idaho, checked out \$33.90 for Calhoum Hardware Store of St. Maries, Idaho, and then said Roy C. Lammers gave me a check for the balance *which* \$3,057.00.

JOHN SHANNON.

Subscribed and sworn to before me this 12th day of July 1907 (before S. M. Babbet)

E. B. CAPLE,

Special Agent, G. L. O.

Witness: S. M. BABBITT. [249]

**Exhibit "I" [Letter, June 11, 1907, to S. L. McFarland].**

4-207.

380863 DEPARTMENT OF THE INTERIOR.  
GENERAL LAND OFFICE.

Washington, D. C.

Dec. 9, 1913.

I hereby certify that the annexed copy of letter, marked Exhibit "I," is a true and literal exemplification from the copy filed with Coeur d'Alene 0668, on file in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office

to be affixed, at the City of Washington, on the day and year above written.

[Seal]

C. M. BRUCE,

Assistant Commissioner of the General Land Office.

380863-1

Serial 0668

C. E. 2500

June 11, 1907.

S. L. McFarland, Esq.,

St. Maries, Idaho.

(File No. —: John Shannon.)

Dear Sir:—

Mr. Roy C. Lammers has referred to us your letter of May 15, 1907, returning the affidavit prepared for William McCarter, stating that Mr. McCarter does not feel disposed to sign this, but is willing to give a quitclaim deed for this land. As Mr. McCarter has no interest in this land whatever, we do not care anything for a quitclaim deed from him, but must insist upon the affidavit, otherwise Mr. Lammers, under our instructions, will retain the consideration for this land now in his hands until the patent is issued, as the guarantee of title.

Yours truly,

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[Endorsed]: Filed May 5, 1914. A. L. Richardson, Clerk. [250]



*In the District Court of the United States for the  
District of Idaho, Northern Division.*

McGOLDRICK LUMBER COMPANY,

Complainant,

vs.

CHARLES J. KINSOLVING and JANE DOE  
KINSOLVING, Whose Real Name is Un-  
known, His Wife, and MILWAUKEE LUM-  
BER COMPANY, a Corporation, LYN  
LUNDQUIST and ELIX LINDQUIST,  
Defendants.

**Petition for Order Allowing Appeal.**

To the Honorable, the Judge of the United States  
District Court for the District of Idaho, North-  
ern Division:

The above-entitled complainant, the McGoldrick Lumber Company, feeling itself aggrieved by the decree made and entered in the above-entitled court in the above-entitled cause on the 6th day of February, 1914, being the decree on the merits herein, hereby prays for the allowance of an appeal from said decree and from each and every part thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the Assignment of Errors annexed hereto and which is filed herewith, and that a transcript of the records and proceedings upon which said decree was rendered may be sent, duly authenticated, to the said Circuit Court of Appeals, under and according to the laws of the United States in such case made and provided, and the com-

plainant hereby offers to execute such bond, with good and sufficient surety, which may be required by the Court in the premises.

CULLEN, LEE & MATTHEWS,  
F. M. DUDLEY,  
JOHN P. GRAY,

Solicitors for Complainant.

[Endorsed]: Filed May 5, 1914. A. L. Richardson, Clerk. [251]

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*In the District Court of the United States for the  
District of Idaho, Northern Division.*

McGOLDRICK LUMBER COMPANY,  
Complainant,

vs.

CHARLES J. KINSOLVING and JANE DOE  
KINSOLVING, Whose Real Name is Un-  
known, His Wife, and MILWAUKEE LUM-  
BER COMPANY, a Corporation, LYN  
LUNDQUIST and ELIX LINDQUIST,  
Defendants.

**Assignment of Errors.**

Comes now the complainant and files the following assignment of errors upon which it will rely upon its appeal from the decree made by this Honorable Court on the 6th day of February, 1914, in the above-entitled action, and the said complainant says that the said decree in said cause is erroneous and against the just rights of the complainant for the following reasons:

## I.

The Court erred in overruling the objection of the complainant to the following question asked of the witness E. B. Caple called by the defendants:

“Q. Now, did you ever have a conversation with Mr. Shannon about his application for the purchase of that land?”

## II.

The Court erred in overruling the objection of the complainant to the introduction in evidence of Defendants' Exhibit No. 1, and in permitting the same to be introduced in evidence.

## III.

The Court erred in overruling the objection of the complainant to the testimony of E. B. Caple, concerning a [252] conversation with John Shannon, and to the statements of Shannon made to the said Caple.

## IV.

The Court erred in holding and deciding that the agreement between John Shannon and William McCarter, dated September 24, 1906, and offered as an exhibit in the contest in the Land Department and there rejected, was before the Land Department or the Secretary of the Interior, or material to the consideration of the said controversy between John Shannon and C. J. Kinsolving.

## V.

The Court erred in overruling the objection of the complainant to the following question asked of the witness William McCarter, a witness called by the defendant:

“Q. Were you familiar with the land for which he made homestead entry or upon which he made homestead entry at the Coeur d’Alene United States Land Office, embracing the South half of the Northwest quarter, the Northeast quarter of the Southwest quarter and the Southwest quarter of the Northeast quarter of Section 9, Township 44, North, Range 3 East?”

VI.

The Court erred in overruling the objection of the complainant to the following question asked of the witness William McCarter, a witness called by the defendant:

“Q. How were you interested in the land?”

VII.

The Court erred in admitting the testimony of William McCarter over the objection of the complainant concerning an agreement between John Shannon and William McCarter with reference to a homestead entry of Shannon. [253]

VIII.

The Court erred in holding and deciding that in the controversy in the Land Department or before the Secretary of the Interior the entryman Shannon was seeking affirmative relief, and that the burden was upon him to show that he was entitled to receive the patent which he sought to have issued.

IX.

The Court erred in holding and deciding that the burden was upon the entryman Shannon in the Land Department or before the Secretary of the Interior to show that he was guilty of no fraud, and in failing



to hold that the burden was upon the person alleging fraud to prove the same by clear and convincing testimony.

### X.

The Court erred in holding and deciding that the standard or measure of proof required in the Land Department or before the Secretary of the Interior to overturn a final certificate and cancel the same for fraud is or should be different than the measure or standard of proof required in the courts to establish fraud.

### XI.

The Court erred in holding and deciding that the Land Department or the Secretary of the Interior could cancel a certificate of entry regularly issued on the ground of fraud upon any less measure of proof than a court of equity could cancel a patent.

### XII.

The Court erred in holding and deciding that it was not necessary to overthrow the same presumption of honesty and the compliance with the law attending a patent, in order to cancel a certificate of entry.  
[254]

### XIII.

The Court erred in failing to hold that the issuance of the final certificate of entry to the entryman Shannon was *prima facie* evidence and raised the legal presumption that the entryman Shannon had complied with the law; and in failing to hold that the same could not be cancelled except for fraud, the testimony of which should be clear, unequivocal and convincing.

XIV.

The Court erred in deciding that the Land Department or the Secretary of the Interior could cancel a certificate of entry regularly issued on the ground of fraud, except upon testimony clear, unequivocal and convincing, and in failing to hold that the Land Department or the Secretary of the Interior had no power to cancel the same upon even a bare preponderance of the evidence which left the issue in doubt.

XV.

The Court erred in failing and refusing to hold that the complainant was the owner of the lands described in the complaint, to wit, the South half of the Northwest quarter; the Southwest quarter of the Northeast quarter, and the Northeast quarter of the Southwest quarter of Section 9, Township 44, North of Range 3, *ELB. M.*, and that the defendants hold the same in trust for the complainant.

XVI.

The Court erred in failing to hold and decree that the defendants be required to convey to the complainant the said premises and the whole thereof.

XVII.

The Court erred in dismissing the complainant's bill. [255]

XVIII.

The Court erred in not entering judgment in favor of the complainant and against the defendants as prayed for.

XIX.

The Court erred in not holding that the action of the Land Department and the Secretary of the In-

terior in cancelling the entry of John Shannon, the grantor of the complainant was illegal, without authority of law and arbitrary.

### XX.

The Court erred in holding that the Land Department of the United States and the Secretary of the Interior in cancelling the said entry acted in accordance with law and in failing to hold that the action of the Land Department and the Secretary of the Interior was in violation of law and of the rights of this complainant.

### XXI.

The Court erred in not holding and deciding that the Register and Receiver of the United States Land Office at Coeur d'Alene, Idaho, erred in holding that the timber and stone entry No. 2500, made by John Shannon for the land in controversy in the contest filed by the defendant, Charles J. Kingsolving, was made for speculative purposes, and not for the sole and exclusive benefit of said John Shannon; and erred in holding said entry for cancellation and in not holding that the Commissioner of the General Land Office and the Hon. Secretary of the Interior erred in affirming the decision of the said Register and Receiver and in holding said entry No. 2500 should be cancelled, and in not holding that each and every act of said officers in regard to the same was and is against the laws of the United States.

### XXII.

The Court erred in not holding that the Hon. Secretary of the Interior in making and rendering his decision affirming the [256] Register and Receiver

of the Coeur d'Alene Land Office in holding the entry of John Shannon for cancellation, wrongfully and unlawfully, against the evidence at said hearing, and without any testimony whatsoever to support said finding found the said entry was made for speculative purposes and not for the sole and exclusive benefit of the applicant John Shannon; and erred in not holding that the said Secretary of the Interior misconstrued and misinterpreted the law in making said decision and in cancelling the entry of said John Shannon and in not issuing a patent for said land.

### XXIII.

The Court erred in failing to hold and decide that there was no evidence before the Land Department or the Secretary of the Interior to justify the cancellation of the certificate of entry issued to John Shannon on the land described in the complaint.

### XXIV.

The Court erred in failing to hold that the Land Department and the Secretary of the Interior erred in cancelling the entry of John Shannon, No. 2500, for the lands described in the complaint, and in failing further to hold that the defendant, Milwaukee Lumber Company, was not an innocent purchaser, and in failing to hold that said company acquired said lands subject to the right of this complainant.

WHEREFORE, the complainant, McGoldrick Lumber Company, prays that for the errors aforesaid and other errors appearing in the said cause to



its prejudice the said decree may be reversed.

CULLEN, LEE & MATTHEWS,  
F. M. DUDLEY,  
JOHN P. GRAY,

Attorneys for Complainant.

[Endorsed]: Filed May 5, 1914. A. L. Richardson, Clerk. [257]

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*In the District Court of the United States for the  
District of Idaho, Northern Division.*

McGOLDRICK LUMBER COMPANY,  
Complainant,

vs.

CHARLES J. KINSOLVING and JANE DOE  
KINSOLVING, Whose Real Name is Un-  
known, His Wife, and MILWAUKEE LUM-  
BER COMPANY, a Corporation, LYN  
LUNDQUIST and ELIX LINDQUIST,  
Defendants.

**Order Allowing Appeal [and Fixing Amount of  
Bond].**

The above-named complainant, McGoldrick Lumber Company, feeling itself aggrieved by the decree and judgment entered in the above-entitled suit on the 6th day of February, 1914, doth hereby appeal from said decree and judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and hereby prays that its appeal be allowed, and that a transcript of the records and proceedings therein, upon which said decree was made, duly authenti-

cated, may be sent to the said United States Circuit Court of Appeals for review.

CULLEN, LEE & MATTHEWS,  
F. M. DUDLEY,  
JOHN P. GRAY,

Solicitors for Complainant.

And now, on this 5th day of May, 1914, it is ORDERED that the appeal prayed for is hereby allowed; the amount of the Bond on Appeal be and the same is hereby fixed in the sum of 500.00 Dollars, and further proceedings in this court be stayed pending said appeal.

FRANK S. DIETRICH,  
Judge.

[Endorsed]: Filed May 5, 1914. A. L. Richardson, Clerk. [258]

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*In the District Court of the United States for the  
District of Idaho, Northern Division.*

McGOLDRICK LUMBER COMPANY,  
Complainant,

vs.

CHARLES J. KINSOLVING and JANE DOE  
KINSOLVING, Whose Real Name is Un-  
known, His Wife, and MILWAUKEE LUM-  
BER COMPANY, a Corporation, LYN  
LUNDQUIST and ELIX LINDQUIST.  
Defendants.

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS,  
that we, McGoldrick Lumber Company, a corpora-

tion, as principal and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto Charles J. Kinsolving and Jane Doe Kinsolving, whose real name is unknown, his wife, Lyn Lundquist and Elix Lindquist and their and each of their heirs, administrators, executors and assigns, and Milwaukee Lumber Company, a corporation, and its successors and assigns, defendants in the above-entitled cause, in the sum of Five Hundred Dollars, lawful money of the United States, for the payment of which well and truly to be made, we hereby bind ourselves and each of our successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 2d day of May, 1914.

WHEREAS, on the 6th day of February, 1914, a decree and judgment was entered in the above-entitled cause in the court aforesaid in favor of the defendants and against the complainant, and the said complainant McGoldrick Lumber [259] Company, is prosecuting an appeal therefrom to the United States Circuit Court of Appeals for the Ninth Circuit.

NOW, THEREFORE, the condition of this obligation is such that if the above-named complainant, McGoldrick Lumber Company, shall prosecute the same to effect, and answer all costs and damages that may be awarded against it, if it fails to make its appeal good, then this obligation shall be void; other-

wise the same shall be and remain in full force and effect.

McGOLDRICK LUMBER COMPANY,  
[Seal] By JOHN P. GRAY,  
Its Attorney and Agent.  
FIDELITY & DEPOSIT COMPANY OF  
MARYLAND,  
By ROBT. H. ELDER,  
Attorney in Fact.  
A. V. CHAMBERLAIN,  
Agent.

State of Idaho,  
County of Kootenai,—ss.

Albert V. Chamberlain, being first duly sworn, on his oath deposes and says: That he is the Agent of Fidelity & Deposit Company of Maryland, a corporation, that executed the foregoing bond as surety, and was authorized to execute said bond in behalf and in the name of said corporation; that the said corporation is authorized by virtue of a full compliance with the laws of the State of Idaho to do business in said state and to execute this bond, and the said corporation is worth the sum of One Thousand Dollars in property not exempt from execution.

ALBERT V. CHAMBERLAIN,

Subscribed and sworn to before me this 2d day of May, 1914.

[Seal] FLORENCE A. DEMERS,  
Notary Public.

[Endorsed]: Filed May 5, 1914. A. L. Richardson, Clerk. [260]



*In the District Court of the United States for the  
District of Idaho, Northern Division.*

McGOLDRICK LUMBER COMPANY,  
Complainant,  
vs.

CHARLES J. KINSOLVING and JANE DOE  
KINSOLVING, Whose Real Name is Un-  
known, His Wife, and MILWAUKEE LUM-  
BER COMPANY, a Corporation, LYN  
LUNDQUIST and ELIX LINDQUIST.  
Defendants.

**Order Directing Transmission of Original Exhibits,  
etc., to Appellate Court.**

On motion of counsel for complainant, it is hereby  
ORDERED that the Clerk of the above-entitled  
court be authorized to transmit the original exhibits  
used upon the trial of this cause to the United States  
Circuit Court of Appeals for the Ninth Circuit at  
San Francisco, Cal., the same to be used on argument  
of said cause on appeal.

FRANK S. DIETRICH,  
Judge.

[Endorsed]: Filed May 5, 1914. A. L. Richard-  
son, Clerk. [261]

*In the District Court of the United States for the  
District of Idaho, Northern Division.*

**McGOLDRICK LUMBER COMPANY.**

Complainant.

vs.

**CHARLES J. KINSOLVING and JANE DOE  
KINSOLVING, Whose Real Name is Un-  
known, His Wife, and MILWAUKEE LUM-  
BER COMPANY, a Corporation, LYN  
LUNDQUIST and ELIX LINDQUIST.**

Defendants.

**Praeceptum for Transcript.**

To A. L. RICHARDSON, Clerk of the Above-en-  
titled Court:

You will please prepare transcript of the complete  
record in the above-entitled cause to be filed in the  
office of the United States Circuit Court of Appeals  
for the Ninth Circuit under the appeal perfected to  
said court, and include in said transcript the follow-  
ing pleadings, proceedings, papers, records and files,  
to wit:

Bill of Complaint, Amended and Supplemental  
Bill of Complaint, Demurrer of Defendants Lund-  
quist and Lindquist, Demurrer of Kinsolving and  
wife and Milwaukee Lumber Company, Order Over-  
ruling Demurrers to Bill of Complaint, Answers of  
Defendants Charles J. Kinsolving and Jane Doe  
Kinsolving, his Wife, and Milwaukee Lumber Com-  
pany, Answers of Lundquist and Lindquist, Replica-  
tions to said Answers, Exhibits introduced upon the

trial of said action and received in evidence, Opinion of the Court, Decree and Judgment, Petition for Appeal, Assignment of Errors, Order Allowing Appeal, Undertaking and Bond on Appeal, Citation, Order for Transmission of Exhibits, Statement of Evidence, Stipulation for Settlement of Statement of Evidence, Order Settling Statement of Evidence, and any and all other Record entries, pleadings, proceedings, papers and files necessary [262] and proper to make a complete record upon said appeal in said cause.

Said transcript to be prepared as required by law and the rules of this court, and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

CULLEN, LEE & MATTHEWS,  
F. M. DUDLEY,  
JOHN P. GRAY,

Solicitors for McGoldrick Lumber Company.

[Endorsed]: Filed May 5, 1914. A. L. Richardson, Clerk. [263]

*In the District Court of the United States for the  
District of Idaho, Northern Division.*

McGOLDRICK LUMBER COMPANY,  
Complainant,  
vs.

CHARLES J. KINSOLVING and JANE DOE  
KINSOLVING, Whose Real Name is Un-  
known, His Wife, and MILWAUKEE LUM-  
BER COMPANY, a Corporation, LYN  
LUNDQUIST and ELIX LINDQUIST.  
Defendants.

**Citation on Appeal [Original].**

United States of America,—ss.

To Charles J. Kinsolving and Jane Doe Kinsolving  
and Milwaukee Lumber Company, a Corpora-  
tion, Lyn Lundquist and Elix Lindquist:

You and each of you are hereby cited and ad-  
monished to be and appear at a term of the United  
States Circuit Court of Appeals for the Ninth Cir-  
cuit to be holden in the City of San Francisco, State  
of California, on the 4th day of June, 1914, at 10  
o'clock of said day, pursuant to an appeal filed in  
the clerk's office of the District Court of the United  
States for the District of Idaho, Northern Division,  
where McGoldrick Lumber Company is complainant  
and appellant, and you are defendants and re-  
spondents, to show cause, if any there be, why said  
decree entered in the above-entitled court and cause  
on the 6th day of February, 1914, being a decree upon  
the merits in said cause, should not be reversed and



set aside and speedy justice done to the parties in that [264] behalf.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the United States, this 5th day of May, 1914.

FRANK S. DIETRICH,

Judge.

[Seal]

Attest: A. L. RICHARDSON,

Clerk.

Service of the above and foregoing Citation on Appeal in the above-entitled action is hereby admitted this 11th day of May, 1914.

J. H. LOMEY,

FRANK L. MOORE,

B. F. NORRIS,

Solicitors for Defendants, Kinsolving & Milwaukee Lumber Company. [265]

[Endorsed]: (Original.) No. 519. In the District Court of the United States, for the District of Idaho, Northern Division. McGoldrick Lumber Co., Plaintiff, vs. Charles J. Kinsolving et al., Defendants. Citation or Appeal. Filed on return May 16, 1914. A. L. Richardson, Clerk. By E. B. Yarrington, Deputy. [266]

*In the District Court of the United States for the  
District of Idaho, Northern Division.*

McGOLDRICK LUMBER COMPANY,

Complainant,

vs.

CHARLES J. KINSOLVING and JANE DOE  
KINSOLVING, Whose Real Name is Un-  
known, His Wife, and MILWAUKEE LUM-  
BER COMPANY, a Corporation, LYN  
LUNDQUIST and ELIX LINDQUIST.

Defendants.

**Return to Record.**

And thereupon it is ordered by the Court that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

[Seal]

Attest: A. L. RICHARDSON,

Clerk. [267]

*In the District Court of the United States for the  
District of Idaho, Northern Division.*

**McGOLDRICK LUMBER COMPANY,**

Complainant,

vs.

**CHARLES J. KINSOLVING and JANE DOE  
KINSOLVING, Whose Real Name is Un-  
known, His Wife, and MILWAUKEE LUM-  
BER COMPANY, a Corporation, LYN  
LUNDQUIST and ELIX LINDQUIST.**

Defendants.

**Certificate of Clerk United States District Court to  
Transcript on Appeal.**

I, A. L. Richardson, Clerk of the District Court of the United States for the District of Idaho, Northern Division, do hereby certify the foregoing transcript of pages number 1 to 268, inclusive, to be full, true and correct copy of the pleadings, and proceedings in the above-entitled cause, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, in accordance with Praecipe for Transcript on file in said cause.

I further certify that the costs of the record herein amounts to the sum of 146.90 Dollars, and that the same has been paid by the appellant.

WITNESS my hand and the seal of said Court affixed at Boise, Idaho, this 26th day of May, 1914.

[Seal]

A. L. RICHARDSON,

Clerk. [268]

[Endorsed]: No. 2429. United States Circuit Court of Appeals for the Ninth Circuit. McGoldrick Lumber Company, a Corporation, Appellant, vs. Charles J. Kinsolving and Jane Doe Kinsolving, Milwaukee Lumber Company, a Corporation, Lyn Lundquist and Elix Lindquist, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

Received and filed May 28, 1914.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.





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IN THE  
United States  
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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McGOLDRICK LUMBER COM-  
PANY,

*Appellant,*

*vs.*

CHARLES J. KINSOLVING, and  
JANE DOE KINSOLVING, whose  
real name is unknown, his wife, and  
MILWAUKEE LUMBER COM-  
PANY, a corporation, LYN LUND-  
QUIST and ELIX LINDQUIST,

*Appellees.*

No. 2429

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BRIEF OF APPELLANT.

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F. M. DUDLEY,  
CULLEN, LEE & MATTHEWS,  
JOHN P. GRAY,

*Attorneys for Appellant.*



IN THE  
United States  
Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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McGOLDRICK LUMBER COM-  
PANY,

*Appellant,*

*vs.*

CHARLES J. KINSOLVING, and  
JANE DOE KINSOLVING, whose  
real name is unknown, his wife, and  
MILWAUKEE LUMBER COM-  
PANY, a corporation, LYN LUND-  
QUIST and ELIX LINDQUIST,

*Appellees.*

No. \_\_\_\_\_

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BRIEF OF APPELLANT  
STATEMENT OF FACTS.

This action was brought to have certain of the appellees decreed to be the holders of the title to 160 acres of land in the State of Idaho by, through and under the patent of the United States, in trust for the appellant and for its use and benefit, and to require the conveyance thereof to the appellant. Decree was entered in favor of the appellees and this appeal taken.



The matter involved originally arose out of a contest filed in the United States Land Office at Coeur d'Alene, Idaho, by the appellee, Charles J. Kinsolving, against the entry of one John Shannon on certain land under the timber and stone act. The Register and Receiver held that the entry was for speculative purposes, which decision was in turn affirmed by the Commissioner of the General Land Office and then by the Secretary of the Interior.

The record upon which the case was decided consisted

First, of the proceedings in the Land Department, testimony in the contest and the several decisions of the Land Department;

Second, of evidence introduced at the trial of the cause showing that the respondent Milwaukee Lumber Company was not an innocent purchaser from Kinsolving;

Third, certain testimony which the appellees introduced for the purpose of supporting the findings of the Land Department with reference to the original entry of Shannon, which evidence had not been before the department.

Chronologically the records show:

(1) That Shannon, the contestee, made homestead entry for the land in question July 17, 1905, and that September 25, 1906, he offered proof in support of his

application to commute said entry. This proof was not completed for the reason that Shannon's testimony showed he had made no cultivation of the land.

(2) September 26, 1906, he relinquished his homestead entry and filed an application to purchase the land under the timber and stone act.

(3) January 16, 1907, pursuant to notice duly published, Shannon offered and submitted his proof for said land under his timber and stone entry; his proof was accepted, he paid for the land, and on the same day the Receiver issued to him a receipt and certificate of purchase No. 2500.

In addition to the record facts above recited, the following facts are established by the evidence, and found by the Register and Receiver:

(4) January 16, 1907, immediately after making the proof and payment for the land, and receiving his certificate, Shannon executed and delivered to Joseph H. Johnson an instrument in the form of a warranty deed, purporting to convey the land in question to said Johnson. The evidence, to which we will hereafter refer more fully, tends to show that this deed was in fact a mortgage.

(5) February 14, 1907, Johnson gave to one Dan McLaren an option for the purchase of the land.

(7) Mr. Johnson testifies, and his testimony in this respect is undisputed, that these papers were given

by him pursuant to a request by Mr. Shannon to find a buyer for the land. (Testimony pages 42-3).

(8) April 25, 1907, Mr. Lammers, acting for his *cesti que trust*, the appellant, purchased the land under this option for \$8,000.00, taking a deed from Johnson, in whom the record title was standing by virtue of the conveyance from Shannon to Johnson of January 16, 1907, and taking also an affidavit from Shannon and From Johnson, reciting that the deed from Shannon to Johnson was in fact a mortgage, and taking also a deed from Shannon, who, according to the recitals, was the equitable owner of the land. These deeds and affidavits were at once recorded.

(9) Three months after the conveyance of the land to Lammers for the McGoldrick Lumber Co., and the recording of the deeds and affidavits recited, the contestant Kinsolving initiated his contest by filing his affidavit of contest against Shannon's entry under the timber and stone act. The charges contained in the affidavit of contest are as follows:

(a) That September 24, 1906, Shannon made a written contract with one William McCarter by which he was to deed and convey to McCarter an undivided one-half interest in and to the land sought to be purchased, when he had submitted his final proof and received the Receiver's receipt therefor.

(b) That after Shannon had submitted his final proof and received the Receiver's receipt for the pur-

chase price, he made and executed a deed conveying the land to Joseph Johnson, who subsequently conveyed the land to Roy C. Lammers and the McGoldrick Lumber Co. That in paying to the Government of the United States the purchase price of the land, the money was furnished to Shannon by other parties in consideration of Shannon giving to the party furnishing such money a part of the consideration which he was to receive from Lammers and the McGoldrick Lumber Co.; and that when the consideration for the conveyance to Lammers and the McGoldrick Lumber Co. was paid, that Shannon did not receive more than one-third thereof, the balance having been paid to the parties who had furnished him the money to make final proof.

(c) That "on account of the matters and things above set forth affiant alleges that the said timber and stone entry No. 2500 was made for speculative purposes, and not for the sole and exclusive benefit of the applicant, John Shannon, and that John Shannon by reason of his agreements and contracts, as aforesaid, did not receive the full consideration and value of said land."

The Register and Receiver upon the testimony, all of which is incorporated in the record here, held the entry for cancellation, which action was affirmed by the Commissioner of the General Land Office and the Secretary of the Interior.



Kinsolving made a lieu selection of the lands, filing Santa Fe script thereon, and by quit claim deed conveyed the same to the Milwaukee Lumber Company for a consideration which was not to be paid until an adjustment had been had of the claims of the McGoldrick Lumber Company.

## SPECIFICATIONS OF ERROR.

### I.

The court erred in overruling the objection of the appellant to the following questions asked of the witness E. B. Caple, called by the appellees:

“Q. Now, did you ever have a conversation with Mr. Shannon about his application for the purchase of that land?”

### II.

The court erred in overruling the objection of the appellant to the introduction in evidence of the appellees' Exhibit No. 1, and in permitting the same to be introduced in evidence.

### III.

The court erred in overruling the objection of the appellant to the testimony of E. B. Caple concerning a conversation with John Shannon, and to the statements of Shannon made to the said Caple.

### IV.

The court erred in holding and deciding that the

agreement between John Shannon and William McCarter, dated September 24, 1906, and offered as an exhibit in the contest in the Land Department and there rejected, was before the Land Department or the Secretary of the Interior, or material to the consideration of the said controversy between John Shannon and C. J. Kinsolving.

## V.

The court erred in overruling the objection of the appellant to the following question asked of the witness William McCarter, a witness called by the appellees:

“Q. Were you familiar with the land for which he made homestead entry or upon which he made homestead entry at the Coeur d’Alene United States Land Office, embracing the south half of the northwest quarter, the northeast quarter of the southwest quarter and the southwest quarter of the northeast quarter of Section 9, Township 44, north, range 3 east?”

## VI.

The court erred in overruling the objection of the appellant to the following question asked of the witness William McCarter, a witness called by the appellees:

“Q. How were you interested in the land?”

## VII.

The court erred in admitting the testimony of William McCarter with reference to a homestead entry of Shannon.

## VIII.

The court erred in holding and deciding that in the controversy in the Land Department or before the Secretary of the Interior the entryman Shannon was seeking affirmative relief, and that the burden was upon him to show that he was entitled to receive the patent which he sought to have issued.

## IX.

The court erred in holding and deciding that the burden was upon the entryman Shannon in the Land Department or before the Secretary of the Interior to show that he was guilty of no fraud, and in failing to hold that the burden was upon the person alleging fraud to prove the same by clear and convincing testimony.

## X.

The court erred in holding and deciding that the standard or measure of proof required in the Land Department or before the Secretary of the Interior to overturn a final certificate and cancel the same for fraud is or should be different than the measure or standard of proof required in the courts to establish fraud.

## XI.

The court erred in holding and deciding that the Land Department or the Secretary of the Interior could cancel a certificate of entry regularly issued on the ground of fraud upon any less measure of proof than a court of equity could cancel a patent.

## XII.

The court erred in holding and deciding that it was not necessary to overthrow the same presumption of honesty and the compliance with the law attending a patent, in order to cancel a certificate of entry.

## XIII.

The court erred in failing to hold that the issuance of the final certificate of entry to the entryman Shannon was *prima facie* evidence and raised the legal presumption that the entryman Shannon had complied with the law; and in failing to hold that the same could not be cancelled except for fraud, the testimony of which should be clear, unequivocal and convincing.

## XIV.

The court erred in deciding that the Land Department or the Secretary of the Interior could cancel a certificate of entry regularly issued on the ground of fraud, except upon testimony clear, unequivocal and convincing, and in failing to hold that the Land Department or the Secretary of the Interior had no power to cancel the same upon even a bare preponderance of the evidence which left the issue in doubt.

## XV.

The court erred in failing and refusing to hold that the appellant was the owner of the lands described in the complaint, to-wit, the south half of the northwest quarter; the southwest quarter of the northeast



quarter, and the northeast quarter of the southwest quarter of Section 9, Township 44, north of Range 3, E. B. M., and that the appellees hold the same in trust for the appellant.

XVI.

The court erred in failing to hold and decree that the appellees be required to convey to the appellant the said premises and the whole thereof.

XVII.

The court erred in dismissing the appellant's bill.

XVIII.

The court erred in not entering judgment in favor of the appellant and against the appellees, as prayed for.

XIX.

The court erred in not holding that the action of the Land Department and the Secretary of the Interior in cancelling the entry of John Shannon, the grantor of the appellant, was illegal, without authority of law and arbitrary.

XX.

The court erred in holding that the Land Department of the United States and the Secretary of the Interior in cancelling the said entry acted in accordance with law and in failing to hold that the action of the Land Department and the Secretary of the Interior was in violation of law and of the rights of the appellant.

## XXI.

The court erred in not holding that the Register and Receiver of the United States Land Office at Coeur d'Alene, Idaho, erred in holding that the timber and stone entry No. 2500, made by John Shannon for the land in controversy in the contest filed by the appellee, Charles J. Kinsolving, was made for speculative purposes, and not for the sole and exclusive benefit of said John Shannon; and erred in holding said entry for cancellation and in not holding that the Commissioner of the General Land Office and the Honorable Secretary of the Interior erred in affirming the decision of the said Register and Receiver and in not holding that each and every act of said officers in regard to the same was and is against the laws of the United States.

## XXII.

The court erred in not holding that the Honorable Secretary of the Interior, in making and rendering his decision affirming the Register and Receiver of the Coeur d'Alene Land Office in holding the entry of John Shannon for cancellation, wrongfully and unlawfully, against the evidence at said hearing, and without any testimony whatsoever to support said finding found the said entry was made for speculative purposes and not for the sole and exclusive benefit of the applicant John Shannon; and erred in not holding that the said Secretary of the Interior misconstrued and misinterpreted the law in making said decision

and in cancelling the entry of said John Shannon and in not issuing a patent for said land.

### XXIII.

The court erred in failing to hold and decide that there was no evidence before the Land Department or the Secretary of the Interior to justify the cancellation of the certificate of entry issued to John Shannon on the land described in the complaint.

### XXIV.

The court erred in failing to hold that the Land Department and the Secretary of the Interior erred in cancelling the entry of John Shannon, No. 2500, for the lands described in the complaint, and in failing further to hold that the appellee Milwaukee Lumber Company was not an innocent purchaser, and in failing to hold that said company acquired said lands subject to the right of this appellant.

### ARGUMENT AND AUTHORITIES.

The appellant contends that there was no evidence whatever upon which the Land Department could cancel the entry of Shannon, and that, under the rules of law governing the cancellation of entries, both as announced by the Federal Courts and as announced and recognized by the Land Department, the cancellation of the entry was wrongful on the part of the Land Department and that the action of the Land Department was the result of an error of law.

The specifications of error will be grouped for discussion; Numbers 8 to 23, inclusive, will be considered together. The rulings upon evidence 1 to 7, inclusive, will be considered together, and the 24th will be considered last and separately.

THE ACTION OF THE LAND DEPARTMENT IN CANCELLING THE ENTRY OF SHANNON WAS IN VIOLATION OF LAW, UNSUPPORTED BY ANY TESTIMONY, AND THE SUBSEQUENT PATENTEE SHOULD HAVE BEEN HELD BY THE COURT BELOW TO BE THE TRUSTEE OF THE APPELLANT.

In presenting this appeal, we shall consider the allegations of the contest filed by Kingsolving against the entry of Shannon in the order above stated.

The first charge is that Shannon on the 24th day of September, 1906, had executed a written agreement with McCarter by which he, Shannon, was to deed and convey to McCarter an undivided one-half interest in and to the lands sought to be purchased, when he had submitted his final proof and received the Receiver's receipt therefor. The Register and Receiver correctly hold that the charges made in the contestant's affidavit as to this alleged contract cannot be considered in this case for the reasons:

(a) That the alleged contract, a copy of which was offered in evidence by the contestant as protestant's Exhibit "A," shows upon its face that it has no refer-



ence to the timber and stone entry, but refers entirely to the homestead entry. The language is that the first party will convey an undivided one-half interest in and to the land "as soon as he, the said party of the first part, makes final homestead proof of the said lands and premises, and receives his receiver's final receipt therefor." Assuming a fact which the evidence contradicts, viz: that this alleged contract was the contract of the contestee, Shannon, it appears therefrom that some time over a year after he had made his original entry, and some two days before he offered his commutation proof, Shannon agreed to convey an undivided one-half interest in the land to be entered as soon as his proof was accepted. Such agreement, of course, would be void, under the statute prohibiting agreements to convey, and if Shannon had made his final proof, and had sworn that he had made no such agreement, he would have been guilty of perjury. He did not, however, make such final proof, but relinquished the entry and made a new entry under a different act of Congress.

Now, unless his previous void contract to convey the land to be entered by him under the homestead law, is a bar to any further entry of public lands of the United States, it would not be a bar to his entry of this or any other land, under the timber and stone act, however fatal it might have been to his homestead entry. That by making such void contract the entryman does not expose himself to any penalty, and does not forfeit his right to enter lands under other public

land laws of the United States, is beyond question. So that the contract, even if it were shown to be Shannon's contract, would afford no grounds for attacking his subsequent timber and stone entry.

(b) The evidence, however, does not show that this contract was Shannon's contract. At the time Shannon executed his deed to Lammers, he denied that he had ever made such a contract and said that if there was one upon the records it was a forgery, and he made an affidavit at that time to this effect. Record p. 47. Contestant's Exhibits "D" and "E," Record pp. 94 and 95, and at the hearing Mr. Shannon testified that when he made this affidavit the facts therein recited were fresh in his mind and that the affidavit was true as he swore to it (Record p. 60); and although Mr. Shannon was present, and called as a witness in the case no attempt was made to show, either by him or by any person, that the alleged contract was in fact Shannon's contract. For this reason the Register and Receiver properly rejected the contract when offered in evidence. And this part of the contestant's case must be held to have totally failed in the Department.

The second allegation contained in the affidavit of contest, for the purpose of showing the alleged fraudulent and speculative purposes of the timber and stone entry, charges that after Shannon had submitted his final proof, and received the Receiver's receipt he made and executed a deed conveying the land to Joseph H. Johnson, who subsequently conveyed the

land to Lammers for the McGoldrick Lumber Co.; that in paying the United States Government the purchase price for the land, the money therefor was furnished Shannon by other parties in consideration of his giving such parties a part of the consideration which he was to receive from Lammers and the McGoldrick Lumber Co. and that when the consideration was paid Shannon did not receive more than one-third thereof, the balance having been paid to the parties who had furnished him the money to make final proof.

(a) These allegations are insufficient to support a finding that Shannon's entry was fraudulent or speculative in its nature. Assuming every statement in the allegation to be true, it would not establish that the entry was speculative or fraudulent.

That Shannon had a right to convey the land immediately upon making final proof and payment therefor, or even before making proof and payment, and at any time after making his original application to enter the land, is settled by the decisions of the United States Supreme Court.

In *U. S. vs. Budd*, 144 U. S., 154, 163, the court says:

"The act does not in any respect limit the dominion which the purchaser has over the land after its purchase from the government, or restrict in the slightest his power of alienation. All that it denounces is a prior agreement, the acting for another in the purchase. If when the title passes from the government no one save the pur-

chaser has any claim upon it, or any contract or agreement for it, the act is satisfied. Montgomery might rightfully go or send into that vicinity and make known generally, or to individuals, a willingness to buy timber land at a price in excess of that which it would cost to obtain it from the government; and any person knowing of that offer might rightfully go to the land office and make application and purchase a timber tract from the government."

In this quotation the court used the term "purchase" as referring to payment by the entryman at the time of making his proof, and antidating the issuance of patent.

In the later case of *Williamson vs. United States*, 207 U. S. 425, the court held that the requirement that the applicant for timber lands should swear that he did no apply to purchase such lands on speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he had not directly or indirectly made any agreement or contract in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should enure in whole or in part to the benefit of any person except himself, applied only to the declaration which he was required to file at the time of making his application to enter the land, and that under the statute he was not required to make such sworn statement at the time he made his proof and payment for the land. They say:



“When the context of the statute is thus brought into view we are of the opinion that it cannot possibly be held, without making by judicial legislation a new law, that the statute exacts from the applicant a reiteration, at the final hearing of the declaration concerning his purpose in acquiring title to the land, since to do so would be to construe the state as including in the final hearing that which the very terms of the statute manifests were intended to be excluded therefrom. Indeed, we cannot perceive how, under the statute, if any applicant has in good faith, complied with the requirements of the second section of the act, and pending the publication of notice, has contracted to convey, after patent, his rights in the land, his so doing could operate to forfeit his right.”

And referring to the departmental requirement that such evidence should be offered at the time of making the final proof they hold that such requirement is void as beyond the power of the department to exact, and add:

“As then there was no requirement concerning the making in the final proof of an affidavit as to the particulars referred to, and as the entryman who had complied with the preliminary requirements was under no obligation to make such an affidavit and had full power to dispose ad interim of his claim upon the final issue of patent, we think the motive of the applicant at the time of the final proof was irrelevant.” Page 462.

And as the allegations of the affidavit above referred to charge only that Shannon did what he would have a perfect right to do at the time he made final proof,

they are insufficient as a matter of law to justify the cancellation of the entry as speculative or fraudulent.

(b) The evidence in the case moreover clearly fails to show any speculative or fraudulent purpose upon the part of Shannon. The apparent thought of the contestant was that there was an understanding with Lammers and the McGoldrick Lumber Co. to purchase this land, and that Johnson, and perhaps other parties, furnished Shannon money to make his payment to the government, under an agreement that when Lammers and the McGoldrick Lumber Co. paid for the land, the parties advancing the money to Shannon would receive a large portion of the purchase price so paid by Lammers and the Lumber Company. Disregarding for the present the conveyance or mortgage to Johnson, we desire to call attention to the undisputed facts with reference to the purchase by Lammers and the Lumber Company. Mr. Lammers testifies that the first talk or conversation he ever had with any person with reference to purchasing this land, was with Mr. McLaren, under his option. (Record p. 43.) That option is dated February 14, 1907, or nearly a month after Shannon had entered and paid for the land.

That his next negotiation with reference to the purchase of this land was between Johnson and himself, after the McLaren option had expired, and at the time the direct option from Johnson to Lammers was given. (Record p. 44.)

This option is dated April 17, 1907, or nearly four months after the entry, and the purchase by Lammers was made April 26, 1907. .

Mr. Lammers also testified that prior to February 14, 1907, the date of the option to McLaren, neither he nor the Lumber Company had any negotiations, or any dealings with Shannon, or with any one, with respect to the purchase of this land, and that prior to the date of the purchase, April 26, 1907, neither he nor the Lumber Company, nor any one for him or the Lumber Company, directly or indirectly, had paid, or agreed to pay, Shannon any money whatsoever for the land. Also, that neither he nor the Lumber Company had had, prior to the time Shannon entered the land in January, 1907, directly or indirectly, any agreement, understanding or arrangement with Shannon, or with anyone acting, or claiming to act, for him, by which they were to purchase the land, or any part thereof; and that they never, prior to the entry, advanced any money, or agreed to advance any money, or security, or anything upon which Shannon could realize money to enable him to enter the land; and that neither he nor the Lumber Company had ever, prior to the date of the option from McLaren, made any arrangement or agreement, directly or indirectly, or had any understanding of any kind, with anyone, by which Shannon was to receive any money, or anyone was to receive any money, from Lammers or the Lumber Company for or on account of this land, or the timber thereon.

Also, that neither he nor the McGoldrick Lumber Co., or any officer or agent of the company, to his knowledge, had any notice or knowledge whatsoever, prior to the date of the purchase of the land from Shannon, or until the initiation of this contest, that there was any claim by anyone that Shannon had not entered the land for his own use and his own benefit. (Record p. 50.)

This testimony is undisputed, and its truthfulness unquestioned. It conclusively disproves the allegation that any party furnished money to Shannon in consideration of his giving the party furnishing such money, a part of the consideration which he was to receive from Lammers or the Lumber Company. There being, at the time he entered the land, no contract, agreement or understanding of any kind with Lammers or the Lumber Company to purchase the land, there could be no arrangement or agreement by Shannon with anyone to pay such person any portion of the consideration to be received from Lammers or the Lumber Company.

(c) Still disregarding for the present the conveyance from Shannon to Johnson, we call attention to the evidence with respect to the distribution of the moneys which were paid by Mr. Lammers to Mr. Shannon.

Mr. Lammers' testimony shows (Record p. ....) that of the \$8,000.00 which was the consideration to be



paid by Lammers for the land, he made payments under the directions of Shannon as follows:

To John Shannon personally.....	\$ 350.00
To the Exchange National Bank of Coeur d'Alene for Mr. Shannon's account.....	1,757.00
To Mr. Joseph Johnson.....	2,939.00
To Judge Ralph T. Morgan.....	900.00
To William Dollar.....	200.00
To R. E. McFarland.....	100.00
To Dan McLaren .....	50.00
To The Calhoun Hardware Company.....	24.00
To Winship & Henderson.....	80.00
<hr/>	
Total.....	\$6,400.00

In addition to these payments Mr. Lammers held back \$600.00 which Shannon had instructed him to pay to William McCarter as money that he owed him, and \$1,000.00, which, under the terms of the agreement was to be retained by Lammers until the United States patent for the land should be issued.

The amount paid to Judge Morgan, \$900.00, was for attorney's services, and its good faith is unquestioned. The payment made to Dollar was to pay up an indebtedness that Shannon owed upon a note. The remaining payments appear to have been payments made upon debts honestly due, and, with the exception of the payment to Joseph Johnson, are not questioned.

The right of Mr. Shannon to apply the moneys received by him from the sale of this land upon indebtedness due or owing by him cannot be doubted, nor is there any element of suspicion in the fact that he made such payments. And even if, in the settlement of his debts, he had parted with the entire consideration which he received for the land, there would still be nothing in the circumstances to cause doubt or inquiry, much less to sustain a contention that the entry was fraudulent, or made for the purpose of speculation.

(d) There remains to be considered in this transaction the dealings with Joseph Johnson, upon which dealings the Register and Receiver base their decision. Testimony with respect to these transactions is not conflicting. Shannon testifies that he had known Johnson prior to making his entry, in January, 1907, a week or thereabouts, and that he stopped at the hotel kept by Johnson, patronized his bar, and when he desired money obtained it from Johnson in sums of ten, twenty or thirty dollars at a time; and that the indebtedness of \$2,939.00, which was paid to Johnson April, 26th, at the time of the purchase of the land by Lammers, was so paid for the purpose of liquidating the indebtedness thus incurred. It will be noted that this amount of indebtedness was the amount existing April 26th, 1907, and not the amount existing in January, when Shannon entered the land; and that Shannon speaks specifically of some sum of money which he

obtained from Johnson about February 1st. (Record p. 56.) What the indebtedness to Johnson was at the date of the entry the testimony does not show. And on cross-examination Shannon testifies that at the time of the sale to Lammers, he owed Johnson something like \$2,900.00, but that most of this sum was borrowed by him after February 1st, 1907. (Record p. 61.) Shannon, whose faculties appeared to have been seriously impaired by the excessive use of liquor, further testified at the hearing of the contest that he had no recollection of executing the deed conveying this land to Johnson on January 16, 1907; that he recalled making the affidavit which was given to Mr. Lammers at the time he purchased the land (Contestant's Exhibit "D" for identification) and that at the time he made this affidavit the facts recited therein were fresh in his mind, and that the affidavit was true as he swore to it, but that he had no independent recollection of giving any mortgage or title to Johnson immediately after making his final proof on January 16th. (Record p. 61.)

Johnson testifies that Shannon was already a customer at his hotel and saloon; that Shannon had given him the conveyance dated January 16, 1907, and that it was intended as a mortgage to secure the moneys which Shannon owed him at that time. This indebtedness, he further testifies, was on account of his hotel and saloon bill (Record p. 65), and for monies loaned from time to time (Record p. 72), but the witness was

unable to say how much Shannon's indebtedness was at the date of making the entry.

The foregoing are the suspicious facts upon which the decision of the Register and Receiver is based. Shannon testifies positively and directly that he did not obtain the money with which he entered this land from Johnson; that his brother, who resided at Columbia Falls, Montana, was indebted to him for money loaned six or seven years before, and had paid him \$500.00 on account of such indebtedness shortly before he made his final proof (Record p. 59). The witness also testifies positively that he did not receive any money on account of his Receiver's receipt prior to the time he conveyed the land to Lammers. (Record p. 59); that Johnson had no agreement with him whatever, at the time he entered the land, by which he, Shannon, was to convey the land to Johnson, and there was no agreement of that kind with anyone. (Record p. 61.) Johnson also testifies directly and positively that he had given Shannon no money for the purpose of enabling him to enter the land at the time he made the entry, and that he had not, prior to the time such entry was made, any arrangement or agreement or understanding with Shannon, directly or indirectly, by which Shannon was to convey the land to the witness after he made his entry. (Record p. 72.)

This testimony, which corresponds with the information given to Mr. Lammers and Mr. Dudley at the time of the purchase of this land by Lammers (see



testimony of Lammers and Dudley (Record pp. 45, 46, 94), is not contradicted or impeached by anyone, and no effort was made to show by any witness that the statements of Messrs. Shannon and Johnson were untrue. Notwithstanding such failure to show that the entry was fraudulent or speculative, or made with monies furnished by other parties for an interest in the land, the Honorable Register and Receiver say:

“We do not find any direct evidence showing that an agreement between Shannon and anyone else prior to the filing of his timber application, or even prior to the submitting of his proof, had been entered into to convey all or any portion of the land or to give anyone any interest therein, *but in the light of his subsequent actions or acts we are inclined to the belief that there was such an understanding and that his conveyance of the land immediately after proof was pursuant to such an agreement.* Shannon had no recollection of making any conveyance immediately after his proof and it seems to us probable that at the time of making an agreement to convey, if such agreement was made prior to proof, he may have been in such condition as not to know what he was doing. It is impossible for us to read the evidence in this case without feeling certain that Shannon was the victim of someone stronger and wiser than he. We think the record will sustain the view that the entry was made for speculative purposes and not for the sole and exclusive benefit of the applicant, and for this reason we recommend that the entry be cancelled.”

It is obvious that in making this finding and decision they base their ruling not upon the ground that any fraud or bad faith was shown, but purely upon the

ground that the evidence left them suspicious of such facts.

It is settled law that fraud and bad faith are never to be presumed. If relied upon in any case for the purpose of striking down a title, it must be shown by clear and positive evidence.

“We take the general doctrine to be that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument, for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt.”

*Maxwell Land Grant Case*, 121 U. S. 325, 381.  
*Colorado Coal Co., vs. U. S.*, 123 U. S. 307,  
 316.

See also, for a careful discussion of the evidence necessary to establish fraud:

*Walker vs. Collins*, (C. C. A.) 59 Fed. Rep. 70.  
*U. S. vs. Detroit Timber & Lumber Co.*, 124  
 Fed. Rep. 393, 401.

We respectfully submit that such reasoning is not correct; that the conclusions from the premises are wrong; that without the smallest particle of direct evidence, the foundation of proof is wanting, and cannot be supplied by the facts in the testimony; and as a result thereof there has been a failure to follow the plain mandates of the law, and that the decisions of

the land department constitute a misconstruction. With the evidence and decisions of the land department in mind, we desire to recapitulate the authorities and law bearing on the subject of circumstantial evidence, and especially the amount and kind necessary to prove frauds.

### CIRCUMSTANTIAL EVIDENCE.

This is proof of various facts or circumstances which usually attend the main fact in dispute, and therefore tend to prove its existence, or to sustain, by their consistency, the hypotheses claimed. (Black's Law Dic.)

There is not one fact in the testimony that attends the main fact in dispute—fraud at the time of the entry—September 26, 1906, and there are no facts which by their consistency sustain the hypotheses claimed—fraud at the time of the entry.

Only one conclusion must be drawn from the facts.

A conclusion is not supported by circumstantial evidence unless the facts relied on are of such a nature and so related to each other that no other conclusion can fairly or reasonably be drawn from them, and this requirement is strictly enforced where decisive direct evidence is probably obtainable, but is not produced. (Cyc. Vol. 17, p. 817, citing numerous cases.)

We maintain that other conclusions than the ones reached by the land department can readily be reached, just as fair and reasonable ones as the one

arrived at; in fact it is impossible to conceive that if the McGoldrick Lumber Co., or any one acting for it, had planned to obtain this land as early as September 26, 1906, the date of Shannon's filing his application, it would have chosen a man as ignorant as Shannon to carry out its scheme, and would have arranged matters as clumsily as the facts disclosed them to be.

As a matter of fact, and as a positive indication that the land department misconstrued the law, their opinions show that they arrived at their conclusions that there was fraud in the original entry of Shannon—September 26, 1906,—by inferences derived from inferences. As an example, they infer that because it was stated that Johnson loaned money to Shannon, although the testimony is clear and satisfactory that money was loaned at many different times, that the money was used to pay the Government for making final proof on January 16, 1907, and from that inference that there must have been fraud in the entry of September 26, 1906. Also, by way of example, they infer that Shannon must have been under the influence of someone stronger and wiser than he, arising from acts of Shannon on and after January 16, 1907—clearly forgetful of the fact that Shannon had made his homestead entry for this land way back in 1905 before meeting any of these parties—and from that inference they infer that there must have been fraud existing at the time of Shannon's filing his application—September 26, 1906. The law is very explicit that such construction is faulty and erroneous.



"There must be some fact of facts proved by direct evidence, just as any other facts in the case are proved, upon which the inference is to be based. No inference will be admitted as circumstantial evidence. Citing *Douglas v. Mitchell, Executor*, 35 Pa. St. 440; *Manning v. Ins. Co.* 100 U. S. 693; *U. S. v. Ross* 92 U. S. 281. (Greenleaf on Ev., Sec. 13 N.)."

The case of *United States v. Ross*, 92 U. S. 281, contains an instructive opinion on this point of law. In that case a person attempted to make a claim under the benefit of the so-called "Captured and Abandoned Property Act." A part of the opinion follows:

"It is obvious that this presumption could have been made only by piling inference upon inference, and presumption upon presumption. Because the 31 bales of the claimant were taken to the warehouse alongside of the railroad at Rome in May, 1864, and the cotton in that warehouse afterwards, at some unknown time (whether before or after Aug. 19, does not appear), was shipped on the road to Kingston, it is inferred that the claimant's cotton was part of the shipment. Because somebody's cotton (how much or how little is not known) arrived at Kingston from Rome at some time not known, and was forwarded to Chattanooga before the 14th of August, 1864, it is inferred that the claimant's 31 bales, presumed to have reached Chattanooga, thus arrived and were forwarded; and because 42 bales were received at Chattanooga on that day from the quartermaster at Kingston, it is inferred that the claimant's bales were among them.

"These seem to us to be nothing more than conjectures. They are not legitimate inferences, even to establish a fact; much less are they presumptions of law. They are inferences from in-

ferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed. Starkie on Ev. p. 80, lays down the rule thus:

“‘In the first place, as the very foundation of indirect evidence is the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter should be established by direct evidence, as if they were the very facts in issue.’ \* \* \*

“The law requires an open, visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. Best, Ev., 95. \* \* \* There is no open and visible connection between the fact out of which the first presumption arises and the fact sought to be established by the dependent presumption.”

(Citing *Douglas v. Mitchell*, 35 Pa. St. 440.)

The point that the presumed fact must have an immediate connection with or relation to the established fact from which it is inferred, and if it has not, it is regarded as too remote, and that the only presumptions of fact which the law recognizes are immediate inferences from facts proved, is also decided in the case of *Manning v. Insurance Co.*, 100 U. S. 693.

Further considering the evidence necessary the citations following show what is required:

To prove fraud, the evidence must be clear and satisfactory. *Lalone v. U. S.*, 164 U. S. 255; *Beck*

*v. Houpert*, 104 Ala. 503; *Kahn v. Traders Ins.*, 4 Wyo. 419.

*Hammon on Evidence*, p. 25.

A man who alleges fraud must clearly and distinctly prove the fraud he alleges, and the proof must be clear and sufficient to satisfy the mind and conscience of the existence of the fraud.

*Kahn v. Ins. Co.*, 4 Wyo. 419.

"We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt."

*U. S. v. Budd*, 144 U. S. 161, quoting from Maxwell Land Grant Case, 121 U. S. 325.

Similar cases to the same effect are *U. S. v. Detroit Timber & Lumber Co.*, 124 Fed. Rep. 393; *Walker v. Collins*, 59 Fed. Rep. 73; *Jones v. Simpson*, 116 U. S. 609; *Hatch v. Bayley*, 12 Cush. 30.

## MERE SUSPICION NOT SUFFICIENT.

"In the examination of questions of fraud, courts will look into all the circumstances; and while express and positive proof is not required yet mere suspicion, leading to no certain results, will not be deemed sufficient ground to establish fraud.

*Waddingham's Executors v. Loker*, 100 Am. Dec. 260, 264.

*Brown v. Mitchell*, 11 Am. St. Rep. 759.

1 *Story's Eq. Jur.* 186.

*Trenchard v. Wanley*, 2 P. Will 166.

*Townsend v. Lowfield*, 1 Ves. 35.

*Walker v. Symonds*, 3 Swanst. 61.

*Bath and Montague's Case*, 3 Ch. Cas. 85.

"It is said to be equally a rule in courts of law and equity, that fraud is not to be presumed, but must be established by proof. Not however by mere circumstances of suspicion, leading to uncertain results, but if not by positive and express proof, at least by circumstances affording strong presumptions.

*Juzan v. Toulmin*, 44 Am. Dec. 462.

## MUST OVERCOME PRESUMPTION OF HONESTY.

The proof must be sufficient to satisfy of the existence of fraud. And to do this, it must be sufficient to overcome the natural presumption of honesty and fair dealing. And that is undoubtedly one of considerable force. Hence neither courts or juries should find fraud except upon reasonably satisfactory evidence.

1 *Story's Eq. Jur.* 187.

*Walker v. Collins*, 59 Fed. Rep. 73.

Vol. XIV., p. 190 *Am. & En. Ency.* and cases cited.

## BARE PREPONDERANCE OF EVIDENCE NOT SUFFICIENT.

A jury is bound to exercise its judgment in accordance with correct and common modes of reasoning. It cannot adopt an inference from a few of the proven facts, when that inference is absolutely inconsistent with, and is repelled by, other equally well proven facts.

*Colo. Coal & Iron Co. v. U. S.*, 123 U. S. 307.

From the facts in the case at bar, it is clear that in making their finding, the land department based their



rulings, not upon the ground that any fraud or bad faith was shown, but purely upon the ground that the evidence leaves them suspicious of such fact. As shown above, however, it is well settled that fraud and bad faith are never to be presumed. If relied upon in any case for the purpose of defeating a title, it must be shown by clear and positive evidence. And the authorities are unanimous that testimony which merely raises a suspicion is insufficient.

It may be suggested that a different ruling applies to a hearing of this nature before the department, but such a suggestion is unsound in principle, and not supported by authority. Prior to the issuance of patent the department possesses the authority, by virtue of its supervision over proceedings in the land office, to cancel an entry for fraud.

*Hawley vs. Diller*, 178 U. S. 476, 488.

*Michigan Land & Lumber Co. vs. Rust*, 168 U. S. 589, 593.

*Orchard vs. Alexander*, 157 U. S. 372, 383.

But this power is not an arbitrary one. The rules which control it with respect to the weight and character of the testimony in an action by the United States in a court to cancel or annul a patent for fraud after its issuance, must of necessity control the department in the exercise of its jurisdiction for the cancellation of any entry for fraud before the patent has issued. The issuance of the patent has not affected the ques-

tion except in so far as it has shifted the form and forum in which the question is to be determined. Where the entry is made, and the land paid for, the entryman, if the proceedings be regular, acquires a vested interest, an equitable title, needing only the patent to perfect it, the naked legal title remaining in the United States until the issuance of the patent.

*Sark vs. Starr*, 5 Wall 402, 418.

*Wirth vs. Branson*, 98 U. S. 118, 121.

*Cornelius vs. Kessel*, 128 U. S. 456, 461.

*Carroll vs. Safford*, 3 How. 441, 460.

*Witherspoon vs. Duncan*, 4 Wall, 210, 218.

In *Cornelius vs. Kessel*, 128 U. S. 456, 461, the court says:

“The power of supervision possessed by the Commissioner of the General Land Office over the acts of the register and receiver of the local land offices in the disposition of the public lands, undoubtedly authorizes him to correct and annul entries of land allowed by them, where the lands are not subject to entry, or the parties did not possess the qualifications required, or have previously entered all that the law permits. The exercise of this power is necessary to the due administration of the land department. If an investigation of the validity of such entries were required in the courts of law before they could be cancelled, the necessary delays attending the examination would greatly impair, if not destroy, the efficiency of the department. But the power of supervision and correction is not an unlimited or arbitrary power. It can be exerted only when the entry was made upon false testimony, or without authority of law. It cannot be exercised so

as to deprive any person of land lawfully entered and paid for. By such entry and payment, the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the commissioner than he can be deprived by such order of any other lawfully acquired property. *Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it.*"

See also *Orchard v. Alexander*, 157 U. S. 372, 383.

*Michigan Land & Lumber Co. v. Rust*, 168 U. S. 589, 593.

*Hawley vs. Diller*, 178 U. S. 476, 488-9.

And in the department the rule that fraud must be established, and that a mere suspicion is not sufficient has been repeatedly laid down in cases where an entry has been contested. Secretary Lamar says:

"It has always been held, as a general rule, that fraud is never presumed, unless such circumstances are shown as will legally justify such an inference. That frauds are frequently practiced under the land laws cannot be doubted; and that individuals and corporations who practice these frauds are exceedingly ingenious in resorting to various subterfuges to avoid detection is equally notorious. But, as was said by Justice McLean, in 9 Pet. U. S., 682, 'Such acts cannot alter the established rules of evidence, which have been adopted as well as with reference to the protection of the innocent as the punishment of the guilty.'"

*George T. Burns*, 4 L. D. 62, 64-5.

*Peter Gaughren*, 6 L. D. 224, 225.

*Hagan vs. Severns, et al.*, 15 L. D. 451, 457.

It may be urged that a finding that the entry was speculative is not equivalent to a finding of fraud. As the statute, however, prohibits a speculative entry, and requires the applicant when making his application to swear that it is not for speculative purposes, it is clear that a speculative entry is a fraudulent entry.

Returning now to the conclusion by the Honorable Register and Receiver that "It is impossible for us to read the evidence in this case without feeling certain that Shannon was the victim of someone stronger and wiser than he," and for the purpose of the argument conceding that there is evidence sufficient to justify this conclusion, it by no means follows that there was a fraudulent or speculative entry by Shannon himself. Bearing in mind that the law is satisfied, if Shannon was acting in good faith when he made his filing for this land September 26, 1906, it may be conceded, for the purposes of the argument, that Johnson's claim of an indebtedness of \$2,939.00 due April 26, 1907, was fraudulent, and that when he obtained the conveyance from Shannon January 16, 1907, he obtained that conveyance by fraud. These concessions would in no wise affect the validity of the entry, and it is with that alone that the department can deal. *If Johnson obtained an undue advantage over Shannon by which he secured an unfair and unjust payment of moneys which Shannon secured by the sale of his land, the question presented would be a question for the courts to decide in an action between Shannon and Johnson.*



*It would not be a matter which the department would have jurisdiction to consider.*

The only question which the department can consider is whether Shannon was a party to a fraudulent attempt to enter this land and secure the title therefor from the United States. Upon this point there is not a word of testimony sufficient to justify the finding made. Every suspicious circumstance in the dealings between Johnson and Shannon is quite as consistent with the theory that Johnson was engaged in defrauding Shannon, as with the theory that Johnson and Shannon were conspiring together to defraud the United States, and this being so, the presumption must be indulged, if it be held that the suspicious circumstances are sufficient to establish fraud, that the fraud was that of Johnson alone, practiced against Shannon, rather than that of Johnson and Shannon together practiced against the United States. This is the necessary result of the doctrine that fraud will never be presumed. It must be presumed in the first instance that neither Johnson nor Shannon would be guilty of fraudulent conduct. If evidence sufficient to show that some fraud was practiced, of which Johnson was necessarily a guilty party, and the evidence is consistent with good faith upon the part of Shannon, the presumption of innocence requires the department to restrict its finding of fraud to Johnson alone, rather than to extend it to both Johnson and Shannon.

## THE POWER OF THE COURT WITH RESPECT TO THE RELIEF PRAYED FOR.

The following propositions as to the powers of the Land Department in issuing patents and as to the powers of the courts over the same, are firmly established:

(1) That the Land Department of the government has the power and authority to cancel and annul an entry of public land when its officers are convinced, upon a proper showing, that the same was fraudulently made;

(2) That an entryman upon the public lands only secures a vested interest in the land when he has lawfully entered upon and paid for the same, and in all respects complied with the requirements of the law;

(3) That the Land Department has control over the disposition of the public lands until a patent has been issued therefor and accepted by the patentee, and

(4) That redress can always be had in the courts where the officers of the Land Department have withheld from a pre-emptioner his rights, where they have misconstrued the law, or where any fraud or deception has been practiced which affected their judgment and decision.

*American Mortgage Co. v. Hopper*, 64 Fed.  
553-560.

*Bell v. Hearne*, 19 Howard, 252.

*Litchfield v. Register & Receiver*, 9 Wall, 575.  
*Gaines v. Thompson*, 7 Wall, 347.  
*Secretary v. McGarrahan*, 9 Wall, 298.  
*Johnson v. Towsley*, 13 Wall, 72.  
*Meyers v. Croft*, 13 Wall, 291.  
*Yosemite Valley Case*, 15 Wall, 77.  
*Shepley v. Cowan*, 91 U. S. 330.  
*Moore v. Robbins*, 96 U. S. 538.  
*Marquez v. Frisbie*, 101 U. S. 473.  
*Quinby v. Conlan*, 104 U. S. 420.  
*Smelting Co. v. Kemp*, 104 U. S. 636.  
*Lee v. Johnson*, 116 U. S. 48.  
*Steel v. Refining Co.* 106 U. S. 447.  
*Cornelius v. Kessel*, 128 U. S. 456.  
*U. S. v. Steenerson*, 50 Fed. 504.  
*Germania Iron Co. v. U. S.*, 58 Fed. 334.

(5) That in the administration and disposition of the public lands, the decisions of the land department upon the questions of fact are deemed conclusive.

*Steel v. Refining Co.*, 106 U. S. 447.  
*Johnson v. Towsley*, 13 Wall 72.  
*Diller v. Hawley*, 81 Fed. 651, 657.

But as outlined in paragraph (4) above, the jurisdiction and power of disposition which the land department has of the lands of the United States, like the power of every other department of the government, is subject to the laws of the land, and the land department's violation or disregard of them is remediable in the courts.

*Hoyt v. Weyerhaeuser*, 161 Fed. 324, 330. And if "they (officers of the land department), err in the construction of the law applicable to any case, or if fraud is practiced upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties founded upon their decisions."

*Shepley v. Cowan*, 91 U. S. 330.

*Moore v. Robbins*, 96 U. S. 530.

*Marquez v. Frisbie*, 101 U. S. 473.

*U. S. v. Maxwell Land Grant Co.*, 121 U. S. 325.

*Hawley v. Diller*, 178 U. S. 476.

*Sanford v. Sanford*, 139 U. S. 642.

There is thus no question that this court has jurisdiction to review and overrule the decision of the land department, because of misconstruction of the law applicable.

## NO EVIDENCE OF FRAUD.

Our contention is that there was a *total lack* of evidence to justify the finding that Shannon's filing made in September, 1906, was speculative; that there was *not a scintilla of evidence* to support the finding that said entry was made otherwise than for his exclusive use and benefit; and that such a question presents a question of law for the determination of the court.



In *Howe vs. Parker*, 190 Fed. 738, at page 746 the court says:

“Whether or not the weight of evidence in substantial conflict sustains the one or the other side of an issue of fact is a question upon which, in cases within his jurisdiction, the final decision of the Secretary of the Interior is conclusive in the absence of fraud or gross mistake. *But whether or not there is at the close of a final trial or hearing before him any evidence to sustain a charge or a finding of fact in support of it, is in his and in every judicial or quasi judicial tribunal, a question of law...* (Citing authorities.) And an injurious error of the Secretary in finally deciding that question presents good ground for relief in equity.”

In *Ward vs. Joslin*, 186 U. S. 142, at page 147, Chief Justice Fuller says:

“When a case is tried by a court without a jury, its findings on questions of fact are conclusive, although open to the contention that there was no evidence on which they could be based.”

In *United States F. & G. Co. vs. Board of Commrs.*, 145 Fed. 144, at page 151 Sandborn, Circuit Judge, says:

“The verdict of a jury concludes all issues of fact and of mixed law and fact save those questions of law which have been reserved for review, demurrer, motion, request or exception. A finding of the court without a jury has the same effect, with the single exception that when the finding is special the question whether the facts found sustain the judgment is open to review.

"The question whether or not at the close of a trial there is a substantial evidence to sustain a finding in favor of a party to the action, is a question of law which arises in the progress of the trial."

To the same effect see

*Laing vs. Rigney*, 160 U. S. 531 at 540.

*So. P. Co. vs. Pool*, 160 U. S. 438 at page 440.

*Moore vs. Robbins*, 96 U. S. 530, 24 L. ed. 848 at 851.

In *Bogan vs. Edinburgh American Land Mortgage Co.*, 63 Fed. 194, the court says:

"No principle is more firmly established in American jurisprudence than that, after the title passed from the United States to a private party, it is the province of the courts to correct the errors of the officers of the land department, which have resulted from fraud, mistake or erroneous views of the law, to declare the legal title to be held in trust for those who have the better right to them, and to compel their conveyance accordingly."

See also

*U. S. vs. Winona, etc.*, 67 Fed. 948 at 959.

*Jordan vs. Smith* (Okl.) 73 Pac. 308 at 309:

"So far as the courts are concerned, the findings of facts by the land department in a contest proceeding are as conclusive and binding upon the court as the verdict of a jury in their own tribunal, and *the only inquiry the court can make is, was there any evidence on which to base the findings?*"

See also

*Paine vs. Foster* (Okl.), 53 Pac. 109 at 115.

In *Potter vs. Holt*, 189 U. S. 292 at page 300, the court says:

“If the facts found by the Secretary had no tendency to sustain the conclusion reached by him, it might be that a question of law would arise, but such is not the case.”

See also the opening paragraphs of the opinion in *James vs. Germania Ins. Co.*, 107 Fed. 601.

McGOLDRICK LUMBER COMPANY IS  
PRACTICALLY A BONA FIDE  
PURCHASER.

We urge these propositions strongly for the reason that the evidence leaves no question but that Mr. Lammers and the McGoldrick Lumber Co. acted in the utmost good faith. If fraud there was, they were not parties thereto. They purchased the land, paying therefor the sum of \$6,400.00 in cash and retaining a balance of \$1,600.00 of the purchase price, and Shannon and Johnson are the beneficiaries of the payment. The loss, if the entry be cancelled, falls upon Lammers and the lumber company, and they are entitled to demand that the entry be not stricken down and they involved in such loss, unless the evidence clearly and unequivocally establishes malconduct upon the part of their grantor, Shannon.

“The Receiver’s final receipts were not notice of fraud and perjury in their procurement, they were notice of honesty and legality in the proceedings that induced their issue. They were

prima facie evidence that those who received them had the right to patents to the lands, and they raised the legal presumption that entrymen and officers alike had complied with the law."

*United States vs. Detroit Timber & Lbr. Co.*  
(C. C. A.), 131 Fed. 668.

The McGoldrick Lumber Company purchased from Shannon after Shannon had received a final certificate of entry from the government. A final entry having been made and a final receipt having been issued by the officers of the government authorized to issue the same to Shannon, he was the equitable owner of the land. The final receipt was an acknowledgment by the government that it has received full payment for the land; that it holds the legal title in trust for the entryman and that it will in due course issue to him a patent.

*United States vs. Detroit Lbr. Co.*, 200 U. S. 337.

The certificate of entry is bona fide evidence of the right to patent.

*Guaranty Savings Bank vs. Bladow*, 176 U. S. 451.

In *Simmons vs. Wagner*, 101 U. S. 261, the court said:

"Where the right to a patent has once become vested in a purchaser of public lands, it is equivalent, so far as the government is concerned, to a patent actually issued. The execution and delivery of the patent after the right to it has become complete, are the mere ministerial acts of the officers charged with that duty."



In other words, the issuance of the final certificate was a declaration by the officers charged with that duty that all preliminary acts necessary to vest title in Shannon had been properly, regularly and legally performed. That final certificate shows that, except for the action of the Land Department complained of in the complaint here, patent would have been issued, and in itself shows that Shannon and his grantees were not strangers to the title, and but for the action of the Land Department in the contest instituted by Kinsolving, would have succeeded to the land.

In a case where a man enters upon public lands, takes a homestead, and before he had complied with the homestead laws and acquired a final certificate he was deprived of his land and the Land Department issued a patent to some third person, in violation of the rights of the homestead entryman, undoubtedly the homestead entryman would have to show that he had complied with the homestead laws for the purpose of showing that he was not a stranger to the title, and that if the wrongful and illegal act of the Land Department be set aside it would inure to his benefit because he would be entitled to a patent.

In the present case, the issuance of the final certificate which was canceled shows that same right in the appellant as the grantee of Shannon, and is in itself sufficient to say but for the improper cancellation of the entry the appellant would have acquired title from the Government of the United States. The appellant

simply, in this case, alleges that it purchased the land upon that final certificate and became the equitable owner thereof, and that as a result of an error of law, in violation of the rights of the appellant, the officers of the Land Department have issued a patent to another.

The court below, in its written opinion, used the following language:

“The view I have taken of the entire record in the land department is about this: Upon strict analysis, and under the rules prevailing in courts of law, the evidence is insufficient to support a finding that Shannon entered into any agreement or arrangement violative of the law, as the same has been construed in the Budd and Williamson cases; at least affirmative relief upon such a theory would be unwarranted. And still the circumstances, remote and meager though they may be, are such that the mind has difficulty in escaping the general impression that there existed some sort of illegitimate relation between Johnson and Shannon touching this entry. That they were of the opinion that there was something to cover up is scarcely open to doubt. In a sense, as long as the controversy was in the land department, Shannon was seeking affirmative relief,—the burden was upon him to show that he was entitled to receive the patent which he sought to have issued. The officers of the land department were within their rights in requiring of him a candid disclosure of his relations with Johnson, and of the source from which he received the money with which he paid the purchase price of the land, in order that they might from such facts intelligently determine whether or not he was entitled to patent. Such a disclosure he declined to make.

Moreover, in its investigation of the facts, the department is not necessarily bound by the strict rules of evidence prevailing in courts of law, and clearly the standard or measure of proof required in suits in equity to cancel patents is not demanded in a proceeding such as this in the land office. It was not necessary here to overthrow the presumption attending a patent, for the very good reason that no patent had been issued. That class of cases, therefore, of which the Maxwell Land Grant case is a conspicuous example, is not in point."

We believe it was the view of the court so expressed that influenced the decision of the court below, and we further believe that the court below took in the statement above set out an erroneous view of the law. The trial court was of the opinion that so long as the controversy was in the land department, the entryman was seeking affirmative relief and the burden was upon him to show that he was entitled to receive the patent which he sought to have issued. Such a ruling is new and is not supported by the rulings which have been uniformly recognized both in the courts and in the department. The statement is applicable up to the time the entryman receives his final certificate of entry, but when that has been issued the burden is then upon either the government or the contestant seeking to set aside the entry for fraud to prove that fraud by legal evidence and not simply by the creating of a suspicion concerning the regularity of the entry or the good faith thereof, to shift the burden onto the entryman. One of the latest expressions

of the land department upon this question is contained in the case of

*Harkrader v. Goldstein*, 31 L. D. 87,

in which case the Secretary says:

"The local land officers had passed upon and approved his proof. They had accepted the money paid for the land and had given a receipt therefor, and upon the proof and payment had issued final certificate of entry. Having complied with all the terms and conditions necessary to obtaining title, and the officers of the government whose duty it was to act in the premises, in the first instance, having accepted his proof and issued final certificate of entry thereon, the town-site entryman, and those for whom he was trustee, had, upon the face of the record, acquired a vested interest in the land, and, under the law, had become prima facie the equitable owners thereof and entitled to a patent, and anyone thereafter attacking the entry thus allowed assumed the burden of establishing such illegality in the procurement or allowance of the entry as would defeat the issuance of patent thereon."

The issuance of the final certificate raised a legal presumption that the entryman had complied with the laws of the United States.

In the *United States vs. Detroit, etc., Company*, 200 U. S. 320, the court says:

"But while, until the issue of the patent the land is under the control of the land department, which, upon proper investigation, and for sufficient reasons, may set aside the certificate of entry, yet this power of the land department can



not arbitrarily be exercised without notice to entryman, and if improperly exercised the rights of the entryman may be enforced in the courts after the patent has issued to other parties. *Guaranty Sav. Bank v. Bladow, supra*. It is true, as against the government, and while the title remains in the government, he may not be able to enforce his equity, because no action can be maintained against the government except upon contract, express or implied. *United States v. Jones*, 131 U. S. 1, 33 L. Ed. 90, 9 Sup. Ct. Rep. 669. But while he may not sue on his equity, he may protect that equity when sued "by the government."

In protecting that equity it must be that the entryman has the right to demand that the final receipt shall not be cancelled upon mere suspicion of fraud, and that as in any other case of fraud there is a burden upon him who alleges it to sustain his charge.

Neither the court below nor the land department gave the benefit of any such rule to the appellant, but held that the burden of sustaining the validity and honesty of the entry was upon the entryman.

*United States v. Detroit Timber & Lbr. Co.*,  
131 Fed. 668.

## THE TESTIMONY OF CAPLE AND WILLIAM McCARTER.

The testimony of E. B. Caple and William McCarter received by the court below is the subject of specifications of error Numbers 1 to 7 inclusive. Objection was made to the admission of the testimony of

Caple and McCarter, the ruling was reserved, and in the decision of the court apparently no ruling was made. First, however, we desire briefly to state what the testimony was.

Mr. Caple testified that he had been a special agent of the General Land Office; knew Shannon and had taken a statement from him, which was introduced in evidence.

On cross-examination, Caple testified he had always kept the statement in his possession and had not turned it in to the United States; that he took it prior to the hearing of the Kinsolving-Shannon contest; that he was present at the hearing and then he testified:

“When did you first advise the defendants here that you had this document?”

A. Why, I don't remember. Mr. Kinsolving, I think, spoke something to me about it after or before, I don't know which, after or before his contest, asked me if I had any—

Q. You couldn't say whether it was before or after?

A. No, I don't remember.” (Record p. 248.)

In other words, Caple testifies that he had taken the statement prior to the contest and as to whether or not he told Kinsolving about it before the contest he does not say, but he does say that he was present at the time of the contest.

Kinsolving did not take the witness stand to show that it was subsequent to the contest, instead of prior thereto.

McCarter testified that he was acquainted with Shannon; that he was interested in a homestead entry of Shannon's; that he paid for the location of it; that he had an understanding with Shannon in writing, which is in the record, for the interest, the agreement being the recorded agreement between Shannon and McCarter, which was before the land department. On page 251 of the Record McCarter testifies that it was before Shannon proved up or was to prove up on his homestead, that he procured the agreement. And on the same page he testifies that he had a conversation with Shannon about acquiring an interest in the land after Shannon had acquired title under the timber and stone act; that that conversation took place at St. Maries and also at Coeur d'Alene. On page 251 McCarter testified that Shannon came to St. Maries to see him about it and that at that time he had an agreement that he was to have an undivided one-half interest or \$2,000, and that he also had a conversation with Joseph H. Johnson about the agreement with Shannon, although that conversation is not repeated in the testimony. He also testifies that he had a conversation with Roy C. Lammers the night before or the night Shannon proved up on his timber and stone claim, which conversation is shown on page 252 of the record.

On cross-examination, McCarter testified that the contract under which he was claiming was the one which had been recorded in the Recorder's office of

Shoshone County. On page 252 he testified as follows:

"Q. Did you have any agreement other than this one?

A. No, it all amounted to the same thing."

He testified that they had reduced their prior agreement to writing and then recorded the writing, and he further testified:

"Q. Did you have any subsequent agreements with him?

A. Yes sir.

Q. Now then, when was it with reference to the date that you recorded that instrument up there that you had the subsequent agreements?

A. About fifteen days later, we came to St. Maries.

Q. About fifteen days later?

A. I wouldn't say exactly the time, but it was a little later.

Q. Well, a couple of weeks anyway?

A. Yes sir.

Q. And that was the first arrangement you had had subsequent to your written arrangement?

A. Yes sir.

Q. And that was up at St. Maries?

A. Yes.

Q. And were you over here at Coeur d'Alene when he tried to make his homestead entry that you have been telling about?

A. Yes sir.

Q. And you went back home to St. Maries?

A. I believe so.

Q. And how long after that was it that you had this conversation with him?

A. I couldn't say exactly to the time, but I should judge it was in the neighborhood of fifteen



days or such a matter; it might have been more or it might have been less, but it was somewhere about that time.

Q. And it was up at St. Maries?

A. Yes sir.

Q. Now, with reference to the time you and he were over here, that was the time he was going to make his homestead proof?

A. He was here and I come down.

Q. He didn't make it?

A. No sir.

Q. And it was about fifteen days subsequent to that?

A. Somewhere about there; it might have been more and it might have been less; I cannot say for sure."

The record in the Land Department shows that Shannon offered proof under his homestead entry on September 25th; that on September 26th he relinquished the homestead entry and filed an application to purchase the land under the timber and stone act, and it was under that timber and stone application that his final certificate was issued, upon which final certificate the plaintiff purchased the property. So that under the testimony of McCarter the agreement with Shannon for any interest in the timber and stone claim was some two weeks after he had made his application therefor, and when, if he ever did make any such agreement with McCarter, he had a right to do so under the construction of the timber and stone act by the Supreme Court in the Williamson case.

Roy C. Lammers was called as a witness on rebuttal and testified that he did not know where Shannon

was; that he had been unable to find him; that he had heard the testimony of McCarter; that McCarter did not at any time state that he had an interest in the stone and timber entry of Shannon; that he called Lammers' attention to the written agreement which had been recorded in Shoshone County, and said he had advanced Shannon some money, or that Shannon owed him money, and that he had a claim of record showing an interest in that claim; that was after the time of proof or about the time he made proof; that Mr. Dudley was his, Lammers', attorney; that he had submitted to Mr. Dudley an abstract for the land, and that he told McCarter that Mr. Dudley considered his title of no consequence. That that was the only contract or agreement referred to in any conversation with McCarter; that he never had any conversation with McCarter concerning any such agreement at or about the time that Shannon cancelled his homestead entry, and that he had no other conversation than the one referred to; that he never had had anything whatever to do with any homestead entry of Shannon's. That he had not at any time prior to the time he purchased the claim from Shannon for the McGoldrick Lumber Company, either individually or for the company, have any interest whatsoever therein, nor did the company, and had not furnished him money therefor. (Record p. 258.)

Such briefly states the testimony, but the appellant maintains now, as it did at the hearing, that all such

testimony is improper, irrelevant, immaterial and incompetent for the reasons set forth in the objection found at pages 243 to 247 of the record.

The contest between Kinsolving and Shannon was tried in the land department, and it is upon the record that was there made and the action of the department upon that record that the appellant complains. The foundation of the appellant's complaint is that the land department erred in a matter of law, and for that reason this suit can be maintained. It cannot be that where such complaint is made this court is going to go into the question of and hear over again the testimony that was or might have been introduced in the contest in the land department. If the appellees can introduce additional evidence, then the appellant would have the right to introduce, not only the evidence introduced at the hearing, but other evidence. The court, in passing upon the question of whether or not the land department had committed an error of law, would have other facts and other evidence before it than that introduced at the hearing, and thus in an indirect way the facts would be tried over again.

Upon the theory of the appellees, the right to that land is to be tried all over again in court, in this proceeding. The correct rule is that the appellant must show:

First, that the patent was wrongfully issued by the land department, and

Second, that the appellant is not a stranger to the title, but would be entitled to the land, except for the action of the land department.

In the case of a homestead entryman, who has not his final certificate, he must show a compliance with the homestead law, but in this case or any other case where the final certificate has been issued, that final certificate is *prima facie* evidence of compliance with the law and is presumptive evidence in this case of the right of the appellant to the land in the event the land department did act in violation of the rights of the appellant as claimed.

For these reasons, we submit that the testimony should not be considered, but we further say that the testimony means nothing in this proceeding; that it amounts to nothing, even if it were considered; that so far as the record is concerned, the testimony of Caple was known to Kinsolving at the time of the other contest—at least it is not shown that he did not know thereof; and as to McCarter's alleged conversation with Shannon concerning any interest in the timber and stone claim, that was two weeks subsequent to the time when Shannon made his original application therefor, and under the Williamson case, it would not have been fraudulent on the part of Shannon to have made such agreement.



THE MILWAUKEE LUMBER COMPANY  
WAS NOT AN INNOCENT PURCHASER  
FROM KINSOLVING.

Upon this question the court below did not pass, considering that the matter was disposed of by the view taken upon the first question. This is covered by Specification of Error No. 24.

The Milwaukee Lumber Company was not an innocent purchaser and took subject to the rights of the appellant. The land was filed upon by Kinsolving with Santa Fe Pacific Railroad scrip, and Kinsolving thereafter by a mere quit-claim deed demised, released and quit-claimed the property to the Milwaukee Lumber Company. The Milwaukee Lumber Company did not pay Kinsolving for the land, but still holds the consideration under the contract, appellant's Exhibit "A," as shown by the testimony of the witness Herick. (Record p. 256.)

In addition thereto, the Milwaukee Lumber Company had full knowledge and notice of the rights of the McGoldrick Lumber Company. Mr. Cullen testified that in May or June he had a conversation with Mr. Braderick, secretary and manager of the Milwaukee Lumber Company, and Mr. Braderick stated that he knew of the claim of the McGoldrick Lumber Company to the property; that he had examined into it before the purchase was made and caused an examination to be made of the records. (Record p. 240.) This testimony was not disputed.

Under the circumstances of this case, with the actual knowledge that Braderick had and particularly with the surrounding circumstances, such as the withholding of the consideration for the property, the Milwaukee Lumber Company was not and could not have been an innocent purchaser under the quit-claim deed.

In *Oliver v. Platt*, 3rd Howard, 383, the court said:

“A purchaser by a deed of quit-claim, without any covenant of warranty, is not entitled to protection in a court of equity as a purchaser for a valuable consideration without notice, and he takes only what the vendor could lawfully convey. \* \* \* \*

In legal effect, therefore, they (quit-claim deeds) did convey no more than Oliver's right, title and interest, in the property; and under such circumstances, it is difficult to conceive how he can claim protection as a bona fide purchaser, for a valuable consideration, without notice, against any title paramount to that of Oliver, which attached itself as an unextinguished trust to the tracts.”

To the same effect are

*Dickerson v. Colgrove*, 100 U. S. 578.

*Baker v. Humphreys*, 101 U. S. 494.

*May v. LeClaire*, 78 U. S. 217.

There are two later cases in the Supreme Court which seem to modify the earlier opinions, but neither of such militate against the position taken by the plaintiff.

In *Moelle v. Sherwood*, 148 U. S. 21 the court held:

"If a grantee by quit-claim deed takes it without notice of an outstanding conveyance or obligation respecting the property, or notice of facts which, if followed up, would lead to a knowledge of such outstanding conveyance or equity, he is entitled to protection as a bona fide purchaser upon showing that the consideration stipulated has been paid, and that such consideration was a fair price for the claim or interest conveyed."

In the case at bar it has been shown that the grantee under the quit-claim deed never did pay the consideration, and has not shown that it was a fair price. Further in the course of the opinion in that case the court said:

"The character of bona fide purchaser must depend upon attending circumstances or proof as to the transaction, and does not arise, as often, though, we think, inadvertently, said, either from the form of the conveyance or the presence or the absence of any accompanying warranty. Whether the grantee is to be treated as taking a mere speculative chance in the property or a clear title must depend upon the character of the title of the grantor when he made the conveyance; and the opportunities afforded the grantee of ascertaining this fact and the diligence with which he has prosecuted them, will, besides the payment of a reasonable consideration, determine the bona fide nature of the transaction on his part."

The same conclusion was reached in the case of

*United States v. California & Oregon Land Co.*, 148 U. S. 31

following *Moelle v. Sherwood*, but in that particular case it was not necessary to the decision, the court holding that the rule could not, even if it existed, be extended beyond the grantee in the quit-claim deed, and would not be extended to cases in which the quit-claim was only a prior conveyance in the chain of title. However, under the decision in

*Moelle v. Sherwood*

the Milwaukee Lumber Company was not an innocent purchaser of this property. According to the testimony of Herrick, he did not get an abstract of title to the land prior to purchasing it (Record p. 256), and on page 255 of the record he testifies as follows:

“Q. What, if any, attempt did you make to discover the condition of the title to this property, record condition?

A. Why, I had—I saw the patent to the Santa Fe Railroad, and the powers of attorney of Kingsolving to sell the land, and a telegram from the land office showing that the title of the land was in the Santa Fe Railroad.

Q. You say a telegram from the landoffice?

A. Yes sir, from the Recorder's office.

Q. Do you know what county recorder that was from?

A. From Wallace, Shoshone County.”

And Herrick again testified that he bought the land, dictated the contract, or form of contract, that should be given and gave the data to Braderick, and went away; that he bought it on the strength of that patent



and the power of attorney and that telegram (Record p. 256) and did nothing else.

Moreover, under the testimony of Mr. Cullen, Braderick had full and complete notice of the claim of the McGoldrick Lumber Company and disregarded it in the purchase.

### CONCLUSION.

We earnestly submit:

First: That a grave injustice has been done to the appellant; that the land department cancelled the entry of Shannon absolutely without a scintilla of evidence to support or justify the same, and without right or authority and in violation of the rights of the appellant;

Second: That the Milwaukee Lumber Company is not an innocent purchaser;

Third: That the appellant was entitled to the decree prayed for in the complaint;

Fourth: That the court below erred in holding in effect that in the controversy in the land department and before the Secretary of the Interior the entryman Shannon was seeking affirmative relief, and that the burden was upon him to show that he was entitled to receive the patent which he sought to have issued, and that in applying any such rule the court below did not give due regard to the presumption arising from

the issuance of a final certificate of entry and proper and due weight thereto.

Respectfully submitted,

F. M. DUDLEY,  
CULLEN, LEE & MATTHEWS,  
JOHN P. GRAY,  
*Attorneys for Appellant.*



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IN THE  
United States  
Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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McGOLDRICK LUMBER COMPAN-  
NY, a corporation,

Appellant,

vs.

CHARLES J. KINSOLVING and  
JANE DOE KINSOLVING, whose  
real name is unknown, his wife, and  
MILWAUKEE LUMBER COMPAN-  
NY, a corporation, LYNN LUND-  
QUIST and ELIX LINDQUIST,

Appellees.

NO. 2429

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BRIEF OF APPELLEES.  
KINSOLVING AND MILWAUKEE LUMBER  
COMPANY.

---

J. H. FORNEY,  
FRANK L. MOORE,  
R. B. NORRIS,

Attorneys for Appellees.

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Filed

NOV 9 - 1914





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QUIST and ELIX LINDQUIST,

**Appellees.**

NO.....

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BRIEF OF APPELLEES.

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STATEMENT OF THE CASE.

The appellees, Kinsolving and the Milwaukee Lum-  
ber Company, a corporation, desire to supplement ap-  
pellant's statement of facts, found in its brief from  
pages 1 to 6, as follows:

Patent to the lands in controversy, issued to the  
Santa Fe Pacific R. R. Co., March 27, 1911, and was

received at the United States Land Office, at Coeur d'Alene, Idaho, on April 5, 1911, and the same was recorded in the office of the Recorder of Shoshone County, Idaho, on September 29, 1911. (Transcript pages 272-274, Plaintiff's Ex. 5.)

Prior to that time, and on the 10th day of January, 1906, the patentee had executed two powers of attorney, authorizing and empowering the defendant, C. J. Kinsolving, "To convey by quitclaim deed all the right, title, interest, and claim" which the Santa Fe Pacific Railroad Company has, or may hereafter, acquire in lands selected or located. (Trans. pages 265-271, Plaintiff's Ex. 3 and 4.)

On the 15th day of September, A. D. 1911, Kinsolving, as attorney-in-fact, for the Santa Fe Railroad Company, executed, and on the 27th day of September following, acknowledged and delivered to the appellee, Milwaukee Lumber Company, a quitclaim deed, conveying the lands and premises in controversy to appellee, Milwaukee Lumber Company. (Trans. pages 262-264, Plaintiff's Ex. 2.)

The consideration of this conveyance was TWELVE THOUSAND (\$12,000.00) DOLLARS, and as payment thereof, the Milwaukee Lumber Company made and delivered its agreement to pay to Kinsolving, the sum of TWELVE THOUSAND (\$12,000.00) DOLLARS on certain terms and conditions. (Trans pages 261-262, Plaintiff's Ex. 1).

All of these instruments, excepting the last mentioned, were filed in the office of the Recorder of Sho-

shone County, Idaho, where the lands in controversy are located, on the 29th day of September, 1911.

On October 9, 1911, the complainant filed its Bill of Complaint in the Circuit Court of the United States, for the Ninth Circuit, District of Idaho, Northern Division. (Trans. pages 1-129).

Thereafter, and on the 16th day of October, 1913, complainant filed an amended and supplemental Bill of Complaint, and thereon procured a restraining order, restraining the defendants, and each of them, from cutting and removing any timber from the land, or from logging the same, or from committing acts of waste thereon. (Trans. pages 129-140.)

The appellees Kinsolving and Milwaukee Lumber Company, joined in a demurrer to the Bill of Complaint, which was filed in the lower court December 4, 1911. (Trans. pages 142-145.)

This demurrer was presented to the court, and on September 6, 1912, the Honorable District Judge, filed his opinion thereon. (Trans. pages 146-147.)

An order overruling this demurrer without prejudice, was entered on the 7th day of September, 1912, and the appellees were given time to answer, (Trans. page 147) and their answer was filed October 5, 1912. (Trans. pages 148-206.) The answer proper ends at page 190, the remaining pages being exhibits as follows: the patent, powers of attorney; deed to the appellee, Milwaukee Lumber Company, and a contract between the appellee Milwaukee Lumber Company



and the defendants Lindquist and Lundquist.

The answer raises several issues of fact, among which are:

(a) The bona fides of the entryman Shannon, when he made his application to purchase the lands and premises involved, on the 26th day of November, 1906. That the timber and stone entry No. 2500, issued to him upon his payment to the government of the purchase price of said lands, was procured by fraud upon the part of the said John Shannon, and was wholly and entirely void, and that Shannon made said application to purchase said lands for speculative purposes, all of which was at all times known to the complainant. (Trans. pages 152-155, paragraph V.)

(b) That neither the complainant nor Roy C. Lammers, agent of the complainant, ever acquired any title to, or interest in, the said lands and premises, either in law or in equity; that it was not then, nor had it ever been entitled to the possession thereof, and is not entitled to receive or hold any legal title thereto. (Trans. page 155, paragraph VI.)

(c) That the complainant was not a bona fide purchaser of said lands and premises for value, or at all, and that it purchased with full knowledge of the fraudulent practices of the entryman Shannon, and at all times knew that said Shannon had, prior to the time he made application for the purchase of said land on the 26th day of September, 1906, made a contract with one William McCarter, whereby he, Mc-

Carter, was to acquire an interest in the lands and premises to which the said Shannon expected to acquire title, by virtue of said application of purchase. (Trans. page 156, paragraph VII.)

The answer also sets forth the transactions between the Santa Fe Pacific Railroad Company and the appellee, The Milwaukee Lumber Company, (Trans. pages 172-176, paragraphs XV-XVIII.)

Thereafter the cause was called for trial, and certain witnesses were called, and oral testimony and documentary evidence was offered and received in evidence. (Trans. pages 232-287.) The cause was submitted, and thereafter, and on February 6, 1914, the Honorable District Judge made and filed his decision in the lower court. (Trans. pages 224-230.) and thereafter and on the 9th day of March, 1914, judgment of dismissal was duly given, made and entered in said cause in said court, dismissing the complainant's suit. (Trans. page 231).

## POINTS AND AUTHORITIES

### I.

The Land Department, including the Secretary of the Interior, the Commissioner of the General Land Office, and all their subordinate officers, constitute a tribunal created by Congress for the purpose of disposing of, and conveying the legal title to, the public lands, to individuals. As such it is vested with jurisdiction to hear and determine all questions of fact that

may arise in any controversy respecting rights claimed by any person, under any laws of the United States, to receive a patent for any public land, and its decisions, upon all matters of fact in the absence of fraud, are conclusive everywhere.

Johnson vs. Towsley, 13 Wall. 72.

Shepley vs. Cowan, 91 U. S. 330.

Marquez vs. Frisbie, 101 U. S. 473.

Vance vs. Burbank, 101 U. S. 514.

Baldwin vs. Stark, 107 U. S. 463.

De Cambra vs. Rogers, 189 U. S. 119.

Greenameyer vs. Coalt, 212 U. S. 434.

Whitcomb vs. White, 214 U. S. 13.

Emmons vs. U. S. 175 Fed. 515.

McKenna vs. Atherton, 160 Fed. 547.

American Mortgage Co. vs. Hopper, 64 Fed.  
553.

## II.

Where the Land Department cancels an entry by an entryman, after issuance to him of a final certificate of payment, on the ground that the entry was fraudulent, and issues a patent to another, the burden is on such entryman, or those claiming under him, in an action to recover the land of such patentee, to show that the department erred in adjudging the title to defendant, and that plaintiff was entitled to a patent, by proof that the entry was valid as against the government.

American Mortgage Co. vs. Hopper, 64 Fed.  
553.

## III.

In exercising this jurisdiction the officers of the Land Department are not confined to the issue raised by the parties to the proceedings before them, but may exercise that just supervision with which the law vests the department over all proceedings instituted to acquire title to portions of the public lands.

Lee vs. Johnson, 115 U. S. 48.

De Cambra vs. Rogers, 189 U. S. 119.

Bailey vs. Sanders, 228 U. S. 603.

## IV.

The Courts cannot exercise any direct appellate jurisdiction over the rulings or judgments of the officers of the Land Department.

Quinby vs. Conlan, 104 U. S. 420.

## V.

For mere errors in practice or of judgment, upon a weight of evidence, in a contested case, by officers of the Land Department, the remedy is by appeal from one officer of the Department to another, generally ending with the Secretary of the Interior, although under special circumstances appeal may be made to the President.

Johnson vs. Towsley, 13 Wall. 72.

Shepley vs. Cowan, 91 U. S. 330.

De Cambra vs. Rogers, 189 U. S. 119.

## VI.

There can be no bona-fide purchaser or transferee



of an entryman until after the issue of the United States Patent.

Hawley vs. Diller, 178 U. S. 476.

American Mortgage Co. vs. Hopper, 64 Fed. 553.

## VII.

The Courts are bound by all procedure in or before the Land Department not prohibited by law.

Johnson vs. Towsley, 13 Wall. 72.

## VIII.

Equitable relief may be invoked only in cases where the complainant has suffered through fraud or where the officers of the Land Department have misconstrued the law or have misapplied the law to the facts found.

Johnson vs. Towsley, 13 Wall. 72.

Warren vs. Van Brunt,<sup>1</sup> 19 Wall. 646.

Moore vs. Robbins, 96 U. S. 530.

Marquez vs. Frisbie, 101 U. S. 473.

Quinby vs. Conlan, 104 U. S. 420.

Smelting Co. vs. Kemp, 104 U. S. 636.

## IX.

Courts will not review a decision of the United States Land Department on the ground that the evidence was insufficient, or that only incompetent evidence was before it, as the power of the Department to try questions of fact, embraces the power to pass on the weight and competency of the evidence.

Johnson vs. Towsley, 13 Wall. 72.

Shepley vs. Cowan, 91 U. S. 330.

De Cambra vs. Rogers, 189 U. S. 119.

Greenameyer vs. Coat, 212 U. S. 434.

Wiseman vs. Eastman, 57 Pac. Rep. 398.

Parsons vs. Venzke, 61 N. W. Rep. 1036.

## X.

Exhibit "A" for identification to the testimony before Receiver, the agreement dated Sept. 24, 1906, between John Shannon and William McCartor, found on page 98 of the transcript was admissible in evidence, under the laws of Idaho, without further proof of the execution of the writing by Shannon.

Revised Codes of Idaho, Sections 3131-3149-3153-3157-5998, which are as follows:

"Same: Form.

Sec. 3131. The certificate of acknowledgment, unless it is otherwise in this chapter provided, must be substantially in the following form:

State of Idaho, County of....., ss.

On this.....day of....., in the year of....., before me (here insert the name and quality of the officer), personally appeared.....  
....., known to me (or proved to me on the oath of.....), to be the person whose name is subscribed to the within instrument, and acknowledged to me that he (or they) executed the same."

"What May Be Recorded.

Sec. 3149. Any instrument or judgment affecting the title to or possession of real property may be recorded under this chapter."

"Acknowledgment Necessary to Authorize Record.

Sec. 3153.. Before an instrument may be recorded, unless it is otherwise expressly provided, its execution must be acknowledged by the person executing it, or if executed by a corporation, by its president or secretary, or proved, and the acknowledgment or proof certified in the manner prescribed by Chapter 3 of this Title: Provided, That if such instrument shall have been executed and acknowledged in any other State or Territory of the United States, or in any foreign country, according to the laws of the State, Territory or country wherein such acknowledgment was taken, the same shall be entitled to record, and a certificate of acknowledgment indorsed upon or attached to any such instrument purporting to have been made in any such State, Territory or foreign country, shall be prima facie sufficient to entitle the same to such record."

"When Deemed Recorded.

Sec. 3157. An instrument is deemed to be recorded when, being duly acknowledged, or proved and certified, it is deposited in the recorder's office with the proper officer for record."

"Certified Copies of Deeds, Etc.

Sec. 5998. Every instrument conveying or affect-

ing real property, acknowledged or proved, and certified, as provided by law, may, together with the certificate of acknowledgment or proof, be read in evidence in an action or proceeding, without further proof; and a certified copy of the record of such conveyance or instrument thus acknowledged or proved, may also be read in evidence, with the like effect as the original, on proof, by affidavit or otherwise, that the original is not in the possession or under the control of the party producing the certified copy."

## XI.

The forbidden agreement entered into between Shannon and McCartor, (Transcript page 98, Exhibit "A" for identification to testimony before Receiver) ended the right of the entryman Shannon to further proceed to acquire title to the land in controversy.

Bailey vs. Sanders, 228 U. S. 603.

## ARGUMENT.

It is the contention of the appellees, Kinsolving and The Milwaukee Lumber Company, a corporation, that the only issues that can be raised in a suit of this nature, (a suit to have The Milwaukee Lumber Company declared a trustee of the legal title to the lands in controversy for the use and benefit of the complainant) are issues of law, and that the only real issue which was before the lower court, and the only issue now before this court, is an issue of law, predicated upon an entire absence or want of evidence to support the decision of the Commissioner of the General



Land Office, that the application of the entryman Shannon, made before the officers of the Local U. S. Land Office, at Coeur d'Alene, Idaho, on the 26th day of September, 1906, was made for speculative purposes, and not for his own use and benefit.

The appellant, in its brief, at pages 6 and 7, specifies seven errors in the rulings of the trial court, upon the admissibility of evidence. We are of the opinion that all of this evidence was cumulative, and was not necessary, but the trial judge in his opinion upon our demurrer, (Trans. page 146), had held that because,

“Under the construction placed upon the timber and stone act in the Williamson case, (207 U. S. 425), decided after the action of the Land Department here complained of, had been taken, it must be held that the evidence of fraud adduced in the contest is at best but remotely circumstantial and extremely meager, and, upon the other hand the circumstances are sufficient at least to raise a suspicion of fraud.”

(His honor was in error in this, see Decision of District Court, Transcript, pages 227-228, beginning with last paragraph of page 227,)

and overruled our demurrer without prejudice to urge the point upon the final hearing, and the order overruling the demurrer, (Trans. page 147), was without prejudice. We then answered and offered this cumulative evidence as circumstantial evidence to establish facts from which fraud might be presumed.

After trial the points raised by demurrer were again urged by appellees and the Honorable District Judge

took the position that the only issues necessary for him to decide were raised by our demurrer. In his decision, (Trans. page 224,) he says:

"In overruling the demurrer to the complaint without prejudice to the further consideration of the points urged, it was hoped from the answer, and the evidence to be adduced, a measure of light might be thrown upon the perplexing questions presented by the record in the Land Office. But it now turns out that with unimportant exceptions, a complete copy of this record was exhibited, together with the bill and the evidence since taken lends little, if any, assistance. Consequently the questions still are substantially those raised by the demurrer."

With a like view of the case we desire to discuss the evidence upon which the Commissioner of the General Land Office cancelled "Timber and Stone Entry No. 2500," issued to John Shannon upon his application to purchase the lands in controversy.

The decision of the Register and Receiver, found in the transcript at page 116, the opinion of the Assistant Commissioner of the General Land Office, found in the transcript at page 124, and the decision of the First Assistant Secretary of the Interior, found in the transcript at page 127, will be of great assistance to the court in determining the weight of the evidence as it was considered by these officers. They appear to have taken the position that the written agreement, dated September 24, 1906, (Trans. page 98, Ex. "A" for identification), whereby Shannon the entryman agreed to convey to McCarter an undivided

one-half interest in and to the lands sought to be purchased, when he had submitted final proof, and received the Receiver's receipt therefor, was incompetent testimony under any of the allegations of the affidavit of contest, and this is the first contention of the appellant made in its brief, (<sup>Brief</sup> ~~Transcript~~ page 13).

The fallacy of this position is readily apparent, when we seriously consider the provisions of Subdivision 2 of the Timber and Stone Act, under which Shannon's application was made. By the terms of that act any direct or indirect agreement or contract made prior to filing an application to purchase, whereby the title to land, which the applicant is about to acquire from the United States, is to inure, in whole or in part, to the benefit of any person, other than the applicant, is prohibited, and the existence of such contract at the time of making application renders all proceedings before the Land Department upon such application, null and void. It is our contention that this agreement, (Trans. page 98-99) is clearly within the inhibition of Subdivision 2 of the Timber and Stone Act. Otherwise, by following the very course which Shannon did, in his attempts to acquire title to the land in controversy the object of Subdivision 2 of the Act of June 3, 1878, could be evaded with impunity.

How easy it would be for instance, for "A" to make a homestead entry upon timber land, just as Shannon did, and then make an agreement with "B" that if he,

"B," would advance or loan to him, "A," money, that he, "A," would repay "B" by conveying to him, "B," an interest in the lands and premises covered by such homestead entry, as soon as he made final proof. Then, if immediately after making this agreement, by which he had procured a loan of money, "A" should relinquish his homestead entry and file an application under the Timber and Stone Act, for the purchase of the same land, and after acquiring title to the land by paying the purchase price which he had secured as a loan by virtue of the agreement, he, "A," could convey, if he so desired, to "B," according to the terms of the agreement between them.

The money advanced by "B" to "A" under this agreement to convey, might have been used by "A" for purposes connected with the acquisition of title, or for any other purpose, but whatever the purpose there is a written and acknowledged contract between "A" and "B" made prior to "A's" application to purchase the land from the United States, whereby "B" is to acquire an interest in the land.

It is true that this contract between Shannon and McCarter could not be enforced had Shannon acquired title to the land, because the contract was prohibited by the provisions of the Act of June 3, 1878. It certainly was an express contract by which Shannon agreed to convey to McCarter a one-half interest in the lands and premises in controversy. It was entered into between the parties, or made by Shannon on the 24th day of September, 1906, prior to the time



he made application to purchase the lands in controversy, which was September 26, 1906.

We feel that counsel for appellant have fallen into an error in this, that they connect the prohibited contract between Shannon and McCarter with Shannon's homestead entry, rather than with the land in controversy. In subdivision A on page 13 of their brief, counsel say:

"That this contract shows upon its face that it has no reference to the Timber and Stone entry, but refers entirely to the homestead entry."

Our contention is that the contract has no relation whatever to either the homestead entry or the application to purchase under the Timber and Stone Act, except that it is a contract prohibited by the provisions of the Timber and Stone Act, because it is made prior to the time Shannon made his application to purchase under the Timber and Stone Act; that it does relate to the lands to which Shannon attempted to acquire title under the Timber and Stone Act, and that it would make no difference whatever whether the land was identified by referring to the homestead entry, or the Timber and Stone application. The land is the same; the contract relates to the land; the land is specifically described in the contract; it is a written contract, executed with all of the formalities of a deed of conveyance of real estate. It is an express contract, and under its terms the title to an undivided one-half interest therein was to directly inure to the benefit of McCarter, after Shannon should acquire

title from the United States.

Had this contract been valid, under the Homestead Laws and under the Timber and Stone Act, and had Shannon, after failing to acquire title under the Homestead laws, as he did fail, proceeded to acquire title under the Timber and Stone Act, there can be no question, but that the contract could have been enforced by McCarter, regardless of the fact that the time when Shannon was to perform his part of the contract was fixed as, "As soon as he, the said party of the first part, makes final homestead proof of the lands and premises, and receives his Receiver's receipt therefor."

We, therefore, most respectfully submit that Shannon was not entitled to a Patent for the land in controversy, because of this contract he had entered into with McCarter, prior to his making the application to purchase under the Timber and Stone Act, and it makes no difference whether the contract was enforceable in a court of equity or not. It makes no difference whether Shannon intended to carry out the terms of the contract or not. It makes no difference whether or not, after he had made his application to purchase under the Timber and Stone Act, *he ch*  
*his* *was* a prohibited contract under the Act of Congress, by which he was endeavoring to purchase the land in controversy from the United States, and it **should** have been considered by the officers of the Land Department when the contest was before them.

The contention of the appellant upon this issue, if followed by a court of equity, would make the provisions of the Timber and Stone Act, prohibiting contracts of this very character so ineffective that the very object of Congress in passing the act would be defeated, and its attempt to prohibit speculation in the public lands futile.

Counsel also make the objection at Subdivision B on page 15 of their brief, that the evidence does not show that this was Shannon's contract. We do not know upon what ground the Register and Receiver refused to admit the certified copy of this contract in evidence, but the objections made when it was offered, are found on page 35 of the transcript, beginning with the words, "By Mr. Dudley" and we most respectfully submit that none of the objections there found were well taken under the rules of evidence prescribed by the laws of Idaho, set forth under Points and Authorities No. X. This Exhibit offered was a certified copy of the record of an instrument, affecting real property, which showed upon its face that it had been acknowledged and certified as provided by law, and recorded in the office of the Recorder of Shoshone County, where the lands in controversy are situated, and it there appeared that the original was not in the possession or under the control of the party producing the certified copy, for the reason that the presumption would naturally follow that after the execution and the delivery of the instrument to McCarter, it would remain in his possession until evidence

to the contrary had been introduced, and if it was material it was competent without further proof of its execution by Shannon. It is true that the Register and Receiver and the Commissioner of the General Land Office, do not base their decisions upon this contract between Shannon and McCartor, but we feel that the court should take into consideration this contract, and construe it and consider it with the Act of June 3, 1878.

As above stated, the main contention of appellant is, that there was no evidence in the record to support the findings of the officers of the Land Department that Shannon made application to purchase the land in controversy for speculative purposes. In addition to the points made by these several officers and discussed by them in their several decisions, we desire to call the attention of the court to matters in the record, which these officers, under the rules laid down in *Lee vs. Johnson* and *Bailey vs. Sanders*, *supra*, were authorized and empowered to consider.

Shannon made a homestead entry upon these lands and premises, and made no effort whatever to make any improvements thereon, or to cultivate the same. He made application to commute this homestead entry, and after having been upon the land for the period of fourteen months he had made no effort to make that meager cultivation required of the entryman under the homestead laws. In his proof in the local Land Office, on the 16th day of January, 1907,



upon his application to purchase under the Timber and Stone Act, these questions are asked Mr. Shannon. (Record page 276).

Q. 4 Are you acquainted with the land above described by personal inspection of each of its smallest legal subdivisions?

A. Yes, sir, all over it thoroughly.

Q. 5 When and in what manner was such inspection made?

A. About 15 or 16 days ago. I examined it thoroughly on foot.

Q. 6. Is the land occupied; or are there any improvements on it not made for ditch or canal purposes, or which were not made by or do not belong to you?

A. No, there are no improvements. Very little. There is just a cabin on it. That is all the improvements on the land? Yes. Whose cabin is that? It is mine.

Q. 7. Is the land fit for cultivation, or would it be fit for cultivation if the timber were removed?

A. If the timber were removed it could not be cultivated.

Q. 11. From what facts do you conclude that the land is chiefly valuable for timber or stone?

A. Because I don't think it is good for anything else.

If these answers are true, why had Shannon made a homestead entry upon the land something over fourteen months before, and why was he trying to acquire title to this land by purchasing the same for

\$1.25 per acre under commuted homestead proof? The thought forcibly suggests itself to us that he and McCarter had entered into a conspiracy to acquire title to this land under the Timber and Stone Act, and that McCarter was to receive a one-half interest in the land, by advancing to Shannon the moneys necessary to enable him to acquire title.

Taking these questions and answers into consideration, the officers of the Land Department were justified in the conclusion that when Shannon made his homestead entry upon this land he never intended to comply with the homestead laws, because he had not inspected or examined the land thoroughly during the time he had held it under his homestead entry, and during that period, which was at least fourteen months, he made no effort to make any improvements. Then following the fact that immediately after he proved up he deeded this land to Joseph H. Johnson, and when he and Johnson sold the land to the appellant he, Shannon, received only about one-half of the purchase price, or Four Thousand (\$4000.00) Dollars, and one-fourth of that, or One Thousand (\$1000.00) Dollars was held by the purchaser, pending the issuance of patent, and the efforts made by the appellant and its attorneys, to make the transactions between Shannon and McCarter, and Shannon and Johnson, and Johnson and McLaren, appear legal and ordinary by the affidavits prepared, (Trans. page 104 Exhibit "D" to testimony before Receiver). Affidavit of John Shannon, (Trans. page 106, Exhibit "E" to

testimony before Receiver). Affidavit of Joseph H. Johnson, (Trans. page 93-98), testimony of F. M. Dudley, (Trans. page 100, Ex. "B," to testimony before Receiver). Affidavit of William McCarter, prepared by F. M. Dudley for McCarter's signature. We desire to call the court's attention to an error in the record, at page 103. It there appears that William McCarter signed the affidavit, Exhibit "B." This is an error, see letter dated June 11, 1907 to S. L. McFarland, Esquire, St. Maries, Idaho, written by Mr. F. M. Dudley, and in connection with this, see the testimony of Mr. Dudley on cross examination, beginning on page 97 of the transcript, we say the officers of the Land Department were justified in their findings that Shannon took the land for speculative purposes, and that the circumstances which made his application come within the inhibition of Subdivision 2 of the Act of June 3, 1878, ~~with~~ his relations with Johnson, prior to his making application to purchase.

Further, we call the court's attention to the cross examination of the claimant in connection with the direct examination, when he made proof, under his application to purchase, (Record page 279), and particularly to questions 6, 7, 8, and 12, and applicant's answers thereto, and consider the same in connection with the fact that this applicant Shannon, had more than year prior to that time made homestead entry upon this land, and in the September preceding had undertaken to commute and acquire title by paying the minimum price of \$1.25 per acre. Then consider

questions 16, 17., and 18, and applicant's answers thereto, and compare the same with his testimony given upon the contest, (Trans. page 58 and 59), and the court cannot avoid the conclusion that Shannon did not have the money with which to purchase this land when he made his application to purchase on September 26, 1906, and in view of the fact that shortly after he made his proof and received his certificate of purchase, on January 16, 1907, he conveyed the land to Joseph H. Johnson, (Trans. page 67), to secure the payment of an unknown amount of money, the conclusion naturally follows that Johnson furnished the money, and taking into consideration the further fact that he had been living with Johnson, at his hotel, and had been a patron of Johnson's saloon for some time before he had made his application to purchase, and was impecunious, and without means to make the purchase, we say that it is no stretch of the imagination to arrive at the conclusion, as the officers of the Land Department did, that there was some arrangement between Shannon and Johnson prior to the time that he made his application to purchase, whereby Johnson was to furnish Shannon the means with which to acquire his title, and that Shannon was to reimburse him by a conveyance of the land, or a division of the proceeds of a sale thereof.

We respectfully call the court's attention to the document entitled "Witness Shannon, Further Examination," (Trans. page 282). This examination was held at the time that he made proof upon his ap-



plication to purchase. It appears from this examination that the Register of the Local Land Office was undertaking to ascertain whether or not Shannon had entered into any prior agreements with any person, and it appears that the Register had particularly in mind a firm or company engaged in purchasing timber, known as Shevlin Clark Timber Co. A reading of this examination will convince the court that Register Dunn had in mind some rumor or some report that the applicant Shannon had entered into some agreement with some person, whereby he was to convey an interest in this land, when he acquired title from the government. One question is:

Q. Have you not made a verbal agreement to convey one-half interest in this land after you get title to it?

A. No.

Q. How do you explain the fact that it has been reported in this office that you have made a verbal agreement to convey a half interest in this land after you get title to it?

A. I don't understand it at all.

Taking into consideration the further facts which were before the officers of the Land Department that a man by the name of English had contested Shannon's entry, (Trans. page 88) and that a man by the name of Hamilton had also contested his entry, (Trans. page 89); that these two contests had been disposed of without a hearing and the records disclosing how they had been disposed of; and the ap-

pellant immediately acquiring title to this land; the efforts that appellant had made to get rid of the Shannon-McCarter agreement, as disclosed by the testimony of Mr. Dudley, by the preparation of the affidavit for McCarter to sign, (a copy of which is found at Transcript page 100, Exhibit "B") and the letter written by Lammers to R. E. McFarland, (Record page 284, plaintiff's Ex. No. 7) stating to McFarland upon what terms he, McCarter would be paid the \$600.00, which Shannon told him, Lammers, to pay to McCarter, the letter written by F. M. Dudley to S. L. McFarland at St. Maries, Idaho, dated June 11, 1907, (Trans. page 286-287, Exhibit 1), we most respectfully submit that these officers were justified in exercising that careful supervision of proceedings in the Land Department, that the law imposes upon them, and which is recognized by the Supreme Court of the United States, in the cases of **Lee vs. Johnson** and **Bailey vs. Sanders, supra**.

We further most respectfully submit that the evidence of both Shannon and Johnson, given upon the contest, upon its face shows a disposition to falsify, and leaves an impression that they were not telling the truth, which is difficult to explain in language. We submit to your Honors that, as attorneys and as chancellors, you have, upon occasions been impressed by the conduct and testimony of a witness before you, or by an affidavit of a person used before you, that the witness or the affiant were not telling the truth, and at the same time the basis or

foundation of this impression would be hard to explain or describe in words. At times, perhaps, this impression amounts to a conviction, for which a reason can be readily assigned. On the other hand, it might amount to a mere suspicion, a suspicion impossible of an explanation that would direct the mind of another to the precise thing or things that aroused this suspicion, and thus it is with the testimony of the witnesses Shannon, Johnson, and Dudley that was given before the Register and Receiver of the Local Land Office upon the contest. As written in that record, it might not create more than a suspicion in the mind of a chancellor, whose impression is received solely and only from a reading of the manuscript, and at the same time the Register and Receiver before whom the witnesses personally appeared; with their personal knowledge of all of the circumstances surrounding Shannon's proof, when he personally appeared before them to make proof, under his application to purchase; his demeanor and conduct; the charges in the English and Hamilton contest; the proceedings upon these contests; the very fact, perhaps, that these two contests were dismissed, shortly before, or shortly after the purchase of this land from Johnson by the complainant, as the case may be, might have been convinced to a moral certainty that Shannon and Johnson, prior to the time he, Shannon, made his application to purchase, had entered into an agreement, prohibited by the terms of the Timber and Stone Act.

We ask that your Honors in reading the testimony of the witnesses, Shannon and ~~McCarter~~ <sup>Johnson</sup>, taken before the Register and Receiver, upon the Kinsolving contest, note how reluctant they were to say anything or to answer any questions asked by the attorney for the protestant, and how evasive they were when they did answer, and how willing they were to answer the questions propounded by the attorney for the appellant.

We call your Honors' attention to the testimony of Shannon, while a witness in the contest proceedings in the Local Land Office, (Trans. pages 58-59). On page 58 he tells us that he had money out on interest and could not get it from the party, and that the party that owed him was his brother at Columbia Falls, Montana, and on page 59 he tells us how his brother returned it to him.

Q. You say you had loaned this money to your brother?

A. Yes.

Q. How long had he had it?

A. Six or seven years, along about '95 to the present time, to the time I proved up, the 16th day of January, or about a month before that he returned it to me.

Q. Well, he had all this amount, didn't he?

A. Yes, more than that; he sent me \$500.00,— five \$100.00 bills in a common letter.

Q. Registered letter?

A. No sir.



Q. And that money you say you earned where?

A. I made the most of it in Montana, some of it in Washington.

We readily understand why John Shannon answered that way respecting the money with which he paid the government for the land in controversy. Johnson had advanced him the money; he, Shannon knew; Johnson knew; Lammers knew; and F. M. Dudley also knew that Shannon had not earned the money with which he had made this purchase; they also knew that the protestant, Kinsolving, would be able to prove that Shannon had not earned this money during the four or five years he had been living in and around the vicinity of Coeur d'Alene; they all knew that Kinsolving could prove his habits; that he was addicted to drink to that extent that he spent all of his earnings that way; they also knew that if he, Shannon, should testify that Johnson had advanced him, Shannon, the money with which to make this purchase that it would be evidence from which the officers of the Land Department could presume that they, Shannon and Johnson, had entered into an agreement or contract respecting the land, in violation of Subdivision 2 of the Act of June 3, 1878. They also knew that if he, Shannon, should say that his brother or any other person, had sent this money to him, Shannon, by registered letter, that he could be detected in his falsehood, if it were false, by an examination of the records of the proper postoffices, and

the only course for him, Shannon, to pursue was to say that he received the money from his brother, and the very fact that he volunteered the information that he had received five one hundred dollar bills in a common letter, leads us irresistibly to the conclusion that he had been coached by somebody to make that statement or that it had been explained to him that by making that statement he could not be detected in his perjury.

At the time that the appellant and its attorneys were taking the affidavits of Johnson and Shannon, and undertaking to procure an affidavit from William McCarter, as disclosed by the testimony of Mr. F. M. Dudley, (Trans. page 93-98), there was a reason for such action.

Until the decision of the Supreme Court of the United States, in the Williamson case, it had been the practice of the Land Department of the Department of the Interior, to require all persons who had made application to purchase public lands, under the Act of June 3, 1878, to make oath upon their final proof, to the same facts, with reference to agreements to sell or convey, that they were required to make in their application, and the Federal Courts of the Ninth Circuit were also holding that if the applicant, prior to the issuance of his certificate of purchase, had directly or indirectly made any agreement or contract, with any person or persons, by which the title he might acquire from the government should inure, in whole or in part, to the benefit of any person, other

than himself, such contract made void all proceedings before the Land Office, and was ground for cancelling his entry, or vacating or setting aside his patent, and made such person amenable to the courts, for the crime of perjury.

The transaction between the appellant and the several parties, Shannon, Johnson, and McCarter, referred to in the testimony of Mr. Dudley, were had on April 25, 1907, (Trans. page 105-107-112), and at that time the lumbermen who were purchasing timber lands, acquired by the individual under the Timber and Stone Act, and the attorneys throughout the Ninth Circuit, were accepting the interpretation of the Timber and Stone Act, made by the Land Department and our courts.

The Williamson case, which limited the agreements prohibited by the Timber and Stone Act, to those made prior to the making of application to purchase, and thus changing the rule of law theretofore followed by the courts of this Circuit and the Land Department, was decided by the Supreme Court on January 6, 1908, long after the transaction between the appellant and Shannon and Johnson.

In view of this fact, we do not hesitate to say that all of the efforts upon the part of the appellant, as disclosed by the testimony of Mr. F. M. Dudley, were for the purpose of giving to the transaction had between Shannon and Johnson, an appearance of validity under the interpretation of the Timber and

Stone Act, as accepted and followed at that time.

We further call the attention of the court to the testimony of Shannon, (Trans. page 79). Toward the bottom of the page the following questions are asked:

Q. Who negotiated the sale for you?

A. In what way?

Q. Between you and Mr. Lammers?

A. Mr. McLaren, I guess, made the sale.

On the next page is the testimony of Joseph H. Johnson, (Trans. page 80).

Q. Mr. Johnson, prior to April 25, 1907, did you give R. C. Lammers an option on this land in question?

A. No, sir, —yes, I did too, —no, I think I gave it to McLaren.

Q. Was that a written option?

A. Yes.

Q. Did you negotiate the sale of this land with Mr. Lammers?

A. No, sir.

Q. Who first approached you with reference to giving an option, if you know?

A. Mr. McLaren.

Q. And did you give McLaren at that time a written option?

A. Yes.

Q. Did you give anyone else a written option?

A. No, sir.



Then follows the cross examination by Mr. Dudley:

Q. I hand you Claimant's Exhibit 1 for identification; (this Exhibit is found at page 115 of the transcript); will you look at that and see if that refreshes your recollection any concerning the transaction?

A. Yes, that is all right, that was long before McLaren, wasn't it?

Q. I hand you protestant's Exhibit "C" for identification, (This exhibit is found at page 103 of the transcript) and ask you to examine that.

A. This is what they took from me to Lammers.

Q. I will ask you if prior to February 14th, 1907, you had given a power of attorney or option to Dan McLaren?

A. Yes.

Q. And after that expired, did you give this option April 17, to Roy C. Lammers, direct?

A. Yes, I must have given it to him; that is my signature all right, but I have forgotten what time it was I gave it to him.....

Q. Had Mr. Shannon told you to find a buyer for this land?

A. Yes, it was through his request that I give that that way; he requested it.

Q. And it was under this option of April 17, that the deal was finally closed, on April 25th?

A. Yes, sir.

Now taking into consideration the fact that McLaren had taken this option prior to February 17th, 1907, and that on February 14, 1907, he assigned the

same to Lammers for the consideration of \$1.00; the further fact that neither Shannon nor Johnson, upon direct examination, could tell anything about the transaction, but upon cross examination by Mr. Dudley, who very adroitly indicated the answer desired by the manner in which he framed his questions, we are forced to the conclusion that Shannon knew nothing whatever about the transaction, and was merely a figurehead in the entire proceeding, and that Johnson was working in the interest of Lammers, if not under his immediate direction.

We now call the attention of your Honors to the entire testimony of Mr. F. M. Dudley, and we most respectfully submit that there was no necessity whatever for the preparation of all of the affidavits so carefully prepared by him, unless he was impressed by something that Shannon had made application to purchase this land for speculative purposes, and in violation of the provisions of the Act of June 3, 1878.

We admit that there is no serious objection to be made to a person securing the payment of money due him, by taking a deed to real estate. The practice is not uncommon, but in an ordinary business transaction if the mortgagor or grantor desires to sell and convey, and the mortgagee or grantee is willing to sell and convey, then a deed from each of them to the same grantee would convey to such grantee both the legal title, which is in the mortgagee, and the equitable title of redemption remaining in the mortgagor,

and it would not be necessary to prepare and record the affidavits which Mr. Dudley required and procured of Shannon and Johnson. Of course, Mr. Dudley says in his testimony that he did this out of an abundance of precaution, but what was this precaution taken against, if he and Mr. Lammers had no suspicion that the application of the entryman Shannon was made in bad faith, and for speculative purposes. This precaution which they exercised in this transaction was so out of the ordinary that in the mind of any reasonable man, it would excite a suspicion that they knew, or believed, at least, that there was something wrong with the application of the entryman Shannon.

Another question suggests itself strongly to our minds, and it undoubtedly influenced the officers of the Land Department in their consideration of this cause when before them, the affidavit of John Shannon, (Trans. page 104, Exhibit "D"), and the affidavit of Joseph H. Johnson, (Trans. page 106, Exhibit "E"), were each subscribed and sworn to on the 25th day of April, 1907. These affidavits were not recorded in the office of the Recorder of Shoshone County until the 7th day of August, 1907, (Trans. page 106-107) until after appellee Kinsolving had filed his notice of contest, which was July 16, 1907, (Trans. page 7).

Further, the testimony of Mr. Dudley, (Trans. page 95) is so remarkable that we quote therefrom:

"I know that Mr. Shannon told us that he owed

Mr. McCarter some \$600.00, and there was some other items, I am not positive but I think there was a memorandum of the sums there. I concluded from Mr. Shannon's appearance that his memory was defective and it occurred to me as possible or probable, in view of the contract of record between Shannon and McCarter, that he might have made a contract of that kind and forgotten all about it, or that his signature might have been procured to the instrument at a time when he was under the influence of liquor, and he have no knowledge of the transaction. I then drew up, simply based on my suspicions as to what might be the facts of the case, the paper which has been marked Exhibit 'B' for identification, (Trans. page 100, Exhibit 'B') and gave it to Mr. Lammers with a request that he forward it to the attorney, or the gentleman who I understood was acting as the attorney for Mm. McCarter, Mr. R. E. McFarland, I think it was, but the statements made in that affidavit were made by him without any direct information on which to base the same. I stated simply what appeared to me might be a possible solution of the apparent discrepancy between Mr. Shannon's statement and affidavit and the existence of a contract between Shannon and McCarter on the record, if John Shannon was the same Shannon."

We respectfully submit that from the foregoing statement of Mr. Dudley, it cannot be successfully or conscientiously argued, that at the time Mr. Dudley did not recognize the written agreement between John Shannon and William McCarter, dated September 24, 1906, and recorded in the office of the County Recorder of Shoshone County, on January 21, 1907, as a contract or agreement in violation of the provisions of



the Timber and Stone Act, and that it was his endeavor, acting for Roy C. Lammers, or the appellant herein, to evade, if possible, the effect of that contract. We further respectfully submit that at this time in the negotiations, Mr. Lammers should have stopped and investigated, had he been acting in good faith, or had he desired to have acted in good faith.

Mark now that Shannon had told them, Lammers and Dudley, that he owed William McCarter \$600.00, and that he had not signed the agreement, dated September 24, 1906, and that such agreement was a forgery; they paid every other dollar which Shannon told them he owed, but they did not pay this \$600.00, and Mr. Dudley advised Mr. Lammers to write to Mr. McCarter's attorney, Mr. R. E. McFarland, and Mr. Lammers did so write to Mr. McFarland, (Trans. page 284, Exhibit No. 7), a letter as follows:

"R. E. McFarland,  
Coeur d'Alene, Idaho.  
Dear Sir:

Herewith I hand you affidavit for Mr. McCarter to sign before a Notary. He can then place it in the bank, drawing on me through the Old National Bank of this city, for \$600.00.

Yours truly,  
ROY C. LAMMERS.

If these gentlemen, Mr. Lammers and Mr. Dudley, at that time had only the statement of John Shannon respecting this agreement between Shannon and McCarter, dated September 24, 1906, and if the right of McCarter thereunder appeared to them in the nature of a suspicion only, why did they write to Mr. Mc-

Farland, an attorney, instead of to Mr. McCarter, or why did they write at all? Why did they prepare any affidavit at all? Why did they not, before paying a dollar out upon this property, see Mr. McCarter, and have an understanding with him as to what he claimed under this written agreement, and if the claim of Mr. McCarter had shown that the agreement was in violation of the Act of June 3, 1878, then Mr. Lammers and Mr. Dudley should have dropped all connection with the transaction of purchase from either Shannon or Johnson, and then again, when Mr. McCarter did not sign the affidavit for this \$600.00, and so advised his attorney, S. L. McFarland of St. Maries, Idaho, and when S. L. McFarland so informed Roy C. Lammers, and Mr. Lammers took Mr. McFarland's letter to Mr. Dudley, then Mr. Dudley wrote the letter, marked Protestant's Exhibit "I," (Trans. page 287):

"June 11, 1907.

S. L. McFarland, Esq.,  
St. Maries, Idaho.

Dear Sir:

Mr. Roy C. Lammers has referred to us your letter of May 15, 1907, returning the affidavit prepared for William McCarter, stating that Mr. McCarter does not feel disposed to sign this, but is willing to give a quitclaim deed for this land. As Mr. McCarter has no interest in this land whatever, we do not care anything for a quitclaim deed from him, but must insist upon the affidavit, otherwise Mr. Lammers, under our instructions will retain the consideration for this land now in his hands until the patent is issued,

as the guarantee of title.

Yours truly,

Mr. Dudley's testimony in regard to this letter is found in the transcript at page 97 and 98. See also the testimony of Mr. Dudley regarding Exhibit "B," the affidavit prepared by Mr. Dudley for William McCarter to sign, (Trans. page 97).

Q. Now referring to Protestant's Exhibit "B" (the affidavit prepared for McCarter to sign) which you testified about and which you say you prepared, isn't it a fact that you sent this affidavit, or had it sent to McCarter, believing he would sign it if he received the \$600.00?

A. I sent it or had it sent to him believing that if it were true he would sign it.

Q. Isn't it a fact that the affidavit was returned to you, as indicated in another of Protestant's exhibits, and that you returned it a second time to him saying that you would not accept anything else than the signing of this affidavit?

A. Mr. Lammers sometime, I won't say the exact date, brought to me the letter of May 15, 1907, marked "Protestant's Exhibit 'G' for identification." On June 11th, 1907, our firm answered that letter, and I have a carbon copy of the answer which states its contents.

If Mr. Dudley expected Mr. McCarter to sign this affidavit prepared by him, Dudley, if the statements therein contained were true, and if McCarter refused to sign the affidavit because it was untrue, but was willing to give a quitclaim deed for the land, and if Mr. Dudley believed that this contract, referred to in the affidavit, was nothing but a mortgage from

Shannon to McCarter, why did Mr. Dudley, in his letter insist that Mr. McCarter sign this affidavit, which he, McCarter was not disposed to sign, and why did he, Dudley, say that under his, Dudley's instructions, Mr. Lammers would retain the \$600.00 due from Shannon to McCarter, unless McCarter sign the affidavit? Remembering now that he was willing to take a deed from Johnson, together with Johnson's affidavit, that the deed from Shannon to Johnson was simply a mortgage, but when McCarter offered him a quitclaim deed for the \$600.00, which he, Dudley, knew Shannon was owing to McCarter, he refused such quitclaim deed, and why? Because it was not a title to the land which Mr. Dudley and Mr. Lammers wanted for the appellant; they wanted to make as much record as they possibly could to show that Shannon had not made application to purchase this land for speculative purposes.

We therefore, most respectfully submit that the conditions connected with and surrounding the transaction of the purchase of this land by Lammers were such that we are justified in saying that Shannon made application to purchase this land for speculative purposes; that Mr. Lammers knew this fact and that indirectly Mr. Lammers was the party with whom John Shannon was dealing when he made his application, in violation of the provisions of the Timber and Stone Act.

Returning now to Exhibit "H," (Trans. page 107) which is the abstract of title to this land, your Honors



will note that the first instrument shown is the agreement between Shannon and Wm. McCarter, which was recorded January 21, 1907, (Trans. page 108); the next is the deed from Shannon to Joseph H. Johnson, which was recorded January 22, 1907, (Trans. page 109); then follows the usual certificate to the abstract, of Stanley P. Fairweather, County Recorder, dated January 22, 1907, (Trans. page 110); then the abstract is continued, and we find that the assignment of the McLaren option was decorded March 11, 1907, (Trans. page 111); (the next instruments in the original Exhibit "H" are the affidavits of Shannon and Johnson, dated April 25th, 1907, and recorded August 7th, 1907. They are omitted from the record at this place as they with the date of record are shown at pages 104 and 106 of the transcript); the next is the Receiver's Receipt, issued to Shannon on January 16, 1907, and recorded August 7, 1907, (Trans. page 112); the next is the deed from Johnson, <sup>4</sup>Lammers, dated April 25, 1907, recorded August 7, 1907, (Trans. page 112-113); next is the deed from Shannon to Lammers, bearing the same date and recorded the same date, (Trans. page 113-114); then following is a second certificate of Mr. Fairweather, County Recorder, under date of the 6th day of January, 1908.

If Mr. Lammers was acting in good faith, why were the affidavits and deeds, arising out of his purchase of this land, from Shannon, on April 25th, withheld from the public record of Shoshone County, until after July

6th, 1907, the day the Kinsolving affidavit of contest was filed.

The foregoing are only a part of the points or phases of the transaction had in connection with the efforts of appellant to acquire title to this land as disclosed by the record of the proceedings before the officers of the Land Department.

Beginning at page 13 of its brief, counsel for appellant argue at length the sufficiency of the contest affidavit filed by the appellee in the Local Land Office. The affidavit of contest contains this allegation:

"On account of the matters and things above set forth, affiant alleges that said Timber and Stone Entry No. 2500, was made for speculative purposes and not for the sole and exclusive benefit of said applicant, John Shannon, and that said Shannon, by reason of his agreements and contracts, as aforesaid, did not receive the full consideration and value of said land." (Trans. page 9).

It is true that in the affidavit of contest, there is no direct allegation that Shannon had what is known as **prior agreement**, or had entered into an agreement with Johnson, with reference to this land, prior to the time he had made application to purchase. It is true, however, that evidence was introduced tending to show such agreement, and that the appellant was present and contested such issue, and it is also true that there is an allegation in the affidavit of contest that Shannon had entered into the written agreement with William McCarter on the 24th day of September, 1906, (Trans. page 8). We respectfully submit that

under the liberal rules of practice adopted by the Land Department the affidavit was sufficient.

Counsel for appellant, throughout their brief cling to the idea that fraud must be shown by direct or positive evidence or that it must be shown beyond reasonable doubt. This is not our understanding of the law controlling the question of the proof of fraud. It is true that the party alleging fraud, especially in the courts of justice, must establish fraud by the burden of proof, and that means nothing more or less than such proof as convinces the mind. On the other hand, positive proof of fraud must come from some party to the fraudulent transaction. As a consequence, in the great majority of cases, the party to a proceeding alleging fraud is met with the positive statement of all parties connected with the fraud, that there was no fraud, and as a result, in the majority of cases, a finding of fraud is always a conclusion from circumstantial evidence. The term fraud, in its legal significance, is not susceptible of a comprehensive definition, or a definition that will apply to all circumstances. Fraud is as much an emotion of the mind as it is an act. There can be no fraud without a fraudulent act coupled with a fraudulent intent. An act to amount to fraud must be done with an intention on the part of the actor to wrong, cheat, or deceive, with the intention that such act shall result to his benefit to the extent that it injures another. The fraud in the case at bar was the act of Shannon in making the application to purchase this land from the

Government, during the existence of a contract or agreement, whereby the title to a part of the land he was to procure, was to inure to the benefit of some other person.

Without ~~the~~ fear of successful contradiction, we say that at the time he made his application, to-wit: On the 26th day of September, 1906, he had entered into such an agreement with William McCarter. The agreement was in writing; was positive; was direct, and had been made with all of the formalities required for a conveyance of real estate.

It appears that the officers of the Land Department took the same view of this agreement that counsel for the appellant take, that is, that it was an agreement relating to an entry, and not to land. In this position we cannot concur, and we are at a loss to understand how or why the officers of the Land Department took this stand.

They found, however, from the financial, mental, and physical condition of Shannon, as disclosed by the testimony, and from all the facts and circumstances surrounding the making of Shannon's application, his proof, and his conduct subsequent to proof, and the issuance of the Receiver's Receipt to him, that he had entered into a prohibited agreement and that he had applied to purchase the land for speculative purposes.

We, therefore, most respectfully submit that the order of the lower court, sustaining the demurrer to the bill of complaint, and dismissing appellant's cause of action, should be affirmed.



If, however, this court should feel that the Bill should not have been dismissed upon the demurrer, and that the appellees should have been required to defend upon the merits, the evidence offered by appellees at the trial, considered with that before the officers of the Land Department, is amply sufficient to sustain the judgment dismissing the bill.

We have in the record an affidavit of Mr. Shannon, made on the 12th day of July, 1907, long before he testified in the proceedings upon the protest of the appellee Kinsolving. This affidavit was made by Shannon, at the request of a special agent of the Commissioner of the General Land Office, Mr. E. B. Caple, (Trans. page 285, Exhibit 1). The affidavit is short and to the point; it discloses in detail the things that were done in connection with Shannon's application to purchase the land in controversy on the 26th day of September, 1906. He tells us that his commutation proof on his homestead entry was rejected and on the same day he relinquished the homestead entry and filed a timber and stone cash entry, on the advice of Roy C. Lammers, the active agent of the appellant in connection with its attempted purchase of this land, and Joseph H. Johnson, to whom he gave a deed immediately after making his proof upon his application. He tells us also that Joseph H. Johnson agreed to furnish all the money he needed to file on the land, as a timber and stone entry, and pay the government for the land when he would offer proof. He says:

"I went to Coeur d'Alene on the 20th day of December, 1906, fifteen days before I offered proof on the timber and stone entry, and I roomed at Joseph H. Johnson's hotel and saloon; said Joseph H. Johnson furnished me all the money I wanted, with the understanding or agreement that he was to get the land before I made proof on the above timber and stone entry. I made a deed to Johnson before I offered proof on the timber and stone and after I offered proof I stayed at the Johnson Hotel, and on the 25th of April I made a deed to Roy C. Lammers of Spokane, and deeded him the above timber and stone entry for the consideration of \$8000.00."

And your Honors will note that this affidavit was sworn to by Shannon on the 12th day of July, 1907, and that the Kinsolving affidavit of contest was filed on the 16th day of July, 1907. He, Caples, fully explains his reason for not transmitting these documents to the Department or to the Commissioner of the General Land Office, because, after Kinsolving had prosecuted his contest to a cancellation of the entry, there was no use in transmitting the evidence he had collected to the Commissioner of the General Land Office. He, Caple, also says that he was present at the hearing of the contest but that he took no part therein, and did not let Kinsolving have the affidavit of Shannon. In this Mr. Caple was following the well known policy of the Department of the Interior, to not interfere in contests between litigants before the Land Department.

Mr. Caple was called as a witness upon the trial of the case in the lower court, and his testimony is

found at pages 248 and 249 of the record. In substance, he says:

"I got this document (Defendant's Exhibit No. 1, Trans. page 285), which I have presented, on the Bank of the St. Maries River, while I was in the employ of the United States.....I didn't transmit it to the government. When Mr. Kinsolving filed his contest, it wasn't of any use to the government. The contest cancelled the entry, and that is all it was gotten for. I had it in my possession ever since I took it. I exercised my judgment about keeping it or transmitting it to the Department. There was no use in transmitting it to the Department after the entry was cancelled. I was not acting for anybody except the government, when I took it, I didn't have any business dealings with Kinsolving at the time.....I did not transmit any of them (the affidavits he took) because the entry was cancelled at a hearing. Contest was filed, it wasn't cancelled, but I gave way for Mr. Kinsolving. Whenever there was a contest filed the government let the private individual contest the entry. I did not advise Mr. Kinsolving, I was waiting until after."

We now desire to call the attention of your Honors to the testimony of the Witness McCarter, and particularly that portion found on page 253 and 254, following "Redirect Examination."

The first talk I had with him after this written agreement was when he was turned down here and couldn't make final proof on his homestead.

THE COURT—I think I will ask this question: When did you first have a conversation with Shannon about the matter of entering this

land or having entered it as a timber and stone claim?

A. Well, sir, it was the day that he was refused his final proof, or just a day or so later; I couldn't say for sure. I know we went to Spokane from here and back, and I can't recall now whether it was right at the time or right after we got back to St. Maries, but it was the next time I seen him after he had made his final proof, after he had recalled his homestead filing and filed a timber and stone on it, he said Roy Lammers had advised him to take a filing, to file a timber and stone claim on it, and I says to him, I says, "Johnnie, where does that put you and me?" and he says, "It will be just the same, Billy," he says, "It is all right," and I says, "Is Lammers going to carry this thing through with you?" and he says "No."

Witness proceeds: That was the first time an agreement was made that I should have an interest in the timber and stone claim. I was here when he failed to make his commuted homestead proof. I had a conversation with him that day about the timber and stone entry and we went to Spokane that night.

We contend that the testimony as a whole, shows that McCarter furnished the \$250.00, location fee, to put Shannon upon this piece of land, as a homestead entryman, and undoubtedly up to the time he undertook to make his commuted homestead proof, on the 25th day of September, 1906, McCarter had furnished him money enough to amount to at least \$600.00, the sum he told Lammers and Dudley, on the 25th day of April, 1907, he owed McCarter. In con-



sideration of this amount, and expecting to acquire title under his commuted homestead proof, he made the agreement to convey one-half of the land to McCarter, as soon as he made his proof. When he failed to make commutation proof upon his homestead entry, he, Shannon, did not know what to do, and Roy C. Lammers advised him, Shannon, to make a timber and stone entry, and Johnson agreed to furnish him, Shannon, all the money he needed to file on the land as a Timber and Stone entry, and also to pay the United States for the land. As soon as McCarter learned this he has this conversation with Shannon as stated in the answer to his Honor's question, and the understanding between them then, and the promise of Shannon was, that the relations between Shannon and McCarter were to be just the same as they had been; the agreement between them, made on the 24th day of September, 1906, was to be carried out, and we say that this then certainly made the written agreement between them, dated September 24, 1906, operative as against the stone and timber entry, by a direct contract or agreement between them, and we are justified in the conclusion that Johnson agreed to furnish Shannon the necessary money to enable him to acquire title to the land in controversy, before he, Shannon, made his application to purchase, and that he, Johnson, made this promise upon Shannon's promise to give him, Johnson, an interest in the land, after he, Shannon, had acquired title from the government. We say we are justified in this conclusion,

because immediately after Shannon had made his proof on the 16th day of January, 1907, upon his application to purchase under the Timber and Stone entry, he, Johnson, procured a deed of the land from Shannon.

We now desire to call the attention of the court to the contention of counsel for appellant, that appellant is a bona fide purchaser of the lands and premises in controversy. We contend that, under the rule laid down in *Hawley vs. Diller*, *supra*, by this court, and the Supreme Court of the United States, there can be no bona fide purchaser of an equitable interest in land, and more particularly in land, the legal title of which is in the United States, but were the rule otherwise, the record shows that the appellant had notice of any claim which McCarter might make to this land in controversy, long prior to its negotiations with Shannon and Johnson on April 25, 1907. Upon page 252 of the record is found the testimony of the witness William McCarter upon this point. This witness says:

"I had a conversation with Roy C. Lammers in regard to this. I remember the time Mr. Shannon made proof upon his application under the Timber and Stone Act. The night before or the night he proved up on his timber and stone claim I had this conversation with Lammers; that took place on the street down here (in the city of Coeur d'Alene, Idaho). I met Roy and I says: 'You are going to buy the Shannon claim, are you?' And he says, 'yes,' and I said, 'I have filed a contract against that,' and he said, 'I can't do noth-

ing with that Billy; our attorneys say it don't amount to anything,' and I walked off and left him."

Roy C. Lammers was also a witness, and testified upon this point. On page 258 of the record, Mr. Lammers says:

"Mr. McCarter stated to me that he had an interest in the timber and stone claim of Mr. Shannon. He did call my attention to a written agreement. That conversation was just about as he stated it, he said that he had advanced Shannon some money, or Shannon owed him money, and that he had a claim of record showing an interest in that claim. That was after the time of proof or about the time he made proof. Mr. Dudley was our attorney at that time. We had a copy of the abstract made in Wallace and submitted it to Mr. Dudley. I stated to Mr. McCarter that Mr. Dudley considered his title of no consequence in the case. That was the contract or agreement that was referred to."

On page 259, under cross examination, this witness testifies:

"Before we purchased this land we had an abstract of title showing the Shannon-McCarter agreements and submitted it to Mr. Dudley."

We most respectfully submit that, if the appellant could become a bona fide holder of an equitable interest in this land, the legal title being in the government, the appellant long before it purchased the land, had not only constructive, but actual notice of McCarter's claim under the Shannon and McCarter agreement, shown in the record at page 98, Exhibit "A."

We assume that counsel will argue that this conversation took place about the time that he, Lammers, purchased the property but both Lammers and McCarter fix it as about the time he, Shannon, made proof under his Stone and Timber application, and we feel that it was before the 21st day of January, 1907, that McCarter and Lammers had this conversation, because it was undoubtedly the refusal of Lammers to recognize Mr. McCarter's agreement with Shannon that caused McCarter to have the same recorded. But, be that as it may, there can be no contention but that the agreement or understanding between Shannon and McCarter, that McCarter was to have an interest in this land, when Shannon acquired title to it from the government, and which was reduced to writing on the 24th day of September, 1906, was continued as between Shannon and McCarter right along up to the time that McCarter filed his written agreement, and the reason that Shannon did not carry out this agreement with McCarter, was because he had entered into a similar agreement with Johnson, and that all of these matters were known to Lammers, when he purchased the land from Shannon, and because Lammers and Dudley understood these conditions, they procured the affidavits from Shannon and Johnson, and undertook to procure the affidavit from McCarter, so that they would be in a position to show, in case it were necessary, that there was no agreement made by Shannon, prior to the time he made application to purchase this land on September 26, 1906, and



Mr. Lammers and Mr. Dudley were so active and so persistent in their efforts, that we are forced to the conclusion that Mr. Lammers at least, knew all about the arrangements between Shannon and McCarter and Shannon and Johnson, if he was not directly interested in Mr. Johnson's agreement with Shannon; and by interest we mean that Mr. Johnson was acting for Mr. Lammers.

It has been argued, and will be pressed upon the court again, that because Shannon said there was no such prior agreement, and because Johnson said there was no prior agreement, and because Lammers said there was no prior agreement, and because there is no positive evidence of such prior agreement, that, of course, there could not have been any such prior agreement, but we most respectfully submit that if Johnson and Shannon did make such prior agreement, and if Lammers knew that they had made such prior agreement, then we would expect all of them to testify as they did, but if Lammers had no knowledge or suspicion of any such prior agreement, in April, when he purchased this land, then why did he and his attorney take all of these precautionary steps to show by affidavit that the deed from Shannon to Johnson was a mortgage when it was absolutely impossible for either Johnson or Shannon to state how much this mortgage was given to secure, and with Shannon saying that the agreement between himself and McCarter was a forgery, why did Mr. Lammers and his attorney prepare the affidavit for McCarter to sign, without conferring

with Mr. McCarter and send it to him, as Mr. Dudley says in his testimony, expecting him to sign it if it stated the truth, and when Mr. McCarter informed Mr. Lammers that he would not sign it (presumably because it did not state the truth), but that he, McCarter, would give to him, Lammers, a quitclaim deed for the \$600.00, why did Mr. Dudley insist that they would not take the quitclaim deed, which would convey any interest that McCarter held, if the agreement of September 24, 1906, was a mortgage, and why did he insist that McCarter sign this affidavit before he, Dudley, would permit his client, Mr. Lammers, to pay the \$600.00.

If the court please, the entire transaction bears upon its face the stamp of fraud. The affidavits they filed, under the statutes of Idaho, were not entitled to record, and, consequently, they gave no notice to subsequent purchasers. If they were acting honestly, and in good faith, there was no necessity for these affidavits, because any time after Shannon had made his application to purchase, he had a right to arrange for the money necessary to make the payment, and he had a perfect right to agree to convey, and the instrument executed by him, conveying the legal title to Johnson, was operative as a deed of conveyance, if he, Shannon, sat quietly by and permitted him, Johnson, to convey the land to Lammers. The efforts of Lammers and his attorney, in connection with this transaction, were not made for the purpose of acquiring the legal title to the property, but were

made for the purpose of covering up some transaction, which they, and each of them, knew to exist, and which they, and each of them, felt affected Shannon's right to acquire title to the land in controversy, under the Timber and Stone Act; and the several officers of the Land Department were right when they held that Shannon had made his application to purchase for speculative purposes, and in violation of the provisions of the Act of June 3, 1878.

It will be argued by counsel for appellant that the testimony of Caple, and the affidavit which John Shannon made for Caple, and the testimony of William McCarter was inadmissible, for the reason that the trial court was limited in this suit to the testimony and evidence submitted to the officers of the Department of the Interior, upon the Kinsolving contest. Under such a rule, a court of equity could be the means of perpetrating a fraud upon the government, by permitting an applicant to purchase land under a timber and stone entry, in violation of the Act of June 3, 1878, and the present case is a good illustration of such an incident.

Kinsolving brought his contest, charging that Shannon had made application to purchase the land in controversy, for speculative purposes, and not for his own exclusive use and benefit; he charged that the unlawful or prohibited agreement was written between Shannon and McCarter, dated September 24, 1906. The officers of the Land Department took the position that this agreement between Shannon and McCarter ap-

plied to a homestead entry, and not to the application to purchase under the Timber and Stone Act, but did find from circumstantial evidence that a prohibited agreement existed between Shannon and Joseph H. Johnson, and thereupon cancelled Shannon's entry, and this circumstantial evidence was sufficient to convince every officer of the Land Department, and the Secretary of the Interior, that Shannon's entry was made for speculative purposes.

Now, if a court of equity is to be permitted to say that while this circumstantial evidence adduced before the Land Department, was sufficient to satisfy these officers, of the fraudulent intent of Shannon in making his application to purchase, it does not convince the court, then the defendant should be permitted to introduce more evidence in support of the charges contained in the contest affidavit, because otherwise, if the Shannon entry was in truth and in fact, subject to cancellation upon the merits, and the officers of the Land Department so found, and the court limits itself to the same evidence, and should not so find, then a court of equity would be perpetrating a fraud, or at least permitting a fraud to be practiced upon the government.

We admit that we have not found any adjudicated cases directly in point upon this proposition, but for the foregoing reasons we feel that the evidence is competent and material and should be considered by the court, if the court feels that it is entitled to consider the evidence at all.



We now desire to discuss briefly, the facts and circumstances surrounding the acquisition of the land in controversy by the defendant, the Milwaukee Lumber Company.

After the cancellation of the Shannon entry, a patent was issued by the Commissioner of the General Land Office, conveying the land to the Santa Fe Pacific Railroad Company, in lieu of land situated in the San Francisco Mountains Forest Reserve, in Arizona, belonging to and conveyed by the Santa Fe Pacific Railroad Company to the United States. This patent is Exhibit No. 5 in the record of testimony taken before the court. (Trans. page 272). The patent bears the endorsement that it was received in the United States Land Office, at Coeur d'Alene, on April 5, 1911. The company conveyed this land to the defendant, Milwaukee Lumber Company, on the 27th day of September, A. D., 1911, by deed, a copy of which is shown at page 262 of the Record, Exhibit 2.

It appears from the testimony of Mr. Herrick, president of the defendant, Milwaukee Lumber Company, that these negotiations were carried on with the defendant Kinsolving, as the attorney in fact of the Santa Fe Pacific Railroad Company. That the powers of attorney, authorizing Kinsolving to act for the Railroad Company and the United States patent to the Railroad Company, were exhibited to him. That the same were unrecorded, and that he had seen a telegram from the clerk and ex-officio Recorder of Shoshone County to the effect that this land in contro-

versy, and which he was buying, belonged to the Santa Fe Pacific Railroad Company, and that he instructed the secretary of the defendant, Milwaukee Lumber Company, to prepare and have executed the necessary papers to close up the transaction, as agreed upon between himself and Mr. Kinsolving. (Trans. page 254-256).

We respectfully submit that Mr. Herrick, in this transaction, exercised the ordinary diligence and precaution of the average business man.

The presumption would naturally be that the patent from the United States not having been recorded, there would be nothing of record in the Recorder's office, affecting the title, and it further showed its good faith in immediately filing the patent, the deed conveying the land, and the powers of attorney, under which the deed was executed, in the office of the Recorder of Shoshone County, and gave to the defendant, Kinsolving, the obligation of the Milwaukee Lumber Company, to pay the purchase price agreed upon. (Trans. page 261, Exhibit 1).

In the bill of complaint, the defendants, Kinsolving, and the Milwaukee Lumber Company, are charged with a conspiracy to defraud the appellant by this transaction, and we respectfully submit that there is not a scintilla of evidence in connection with this entire transaction to show any conspiracy or any attempt to defraud the appellant. As above shown, the patent was received in the Local Land Office on April 5, 1911; the patent is dated the 27th day of

March, 1911, and upon that date the appellant could have commenced this suit. The closing of the transaction between these appellees must have dragged along from the 15th day of September, the date of the deed, by which the Milwaukee Lumber Company acquired title, to the 27th day of September, the day of the acknowledgment of the execution of the deed by Kinsolving. Therefore, we most respectfully submit that the entire transaction shows upon its face that it was honest, bona fide and was not entered into pursuant to any conspiracy or desire to defraud the appellant. Mr. Herrick says that the reason the Milwaukee Lumber Company had not paid the consideration, according to the terms of its written agreement with Kinsolving (Complainant's Exhibit 1, Trans. page 261), was because the defendant, Milwaukee Lumber Company, had been charged with a conspiracy, and he did not feel like making the payment until the suit was decided, (Trans. page 256), but nevertheless, we submit that the Milwaukee Lumber Company is liable to Kinsolving, or the Santa Fe Pacific Railroad Company, whichever the case may be, regardless of the action of the court in this suit.

Without discussing in detail, we desire to call the attention of the court to the testimony of Mr. W. E. Cullen. *Despite* the fact that the appellant, in its amended and supplemental bill has charged the defendant, Kinsolving, and the Milwaukee Lumber Company with a conspiracy to defraud the appellant, in the conveyance of the land in controversy by the

defendant, Kinsolving, to the defendant, Milwaukee Lumber Company, ~~the~~ the witness, Cullen, testifies that one Braderick, an officer of the appellee, Milwaukee Lumber Company, had stated to him, Mr. Cullen, in a general conversation that he, Braderick, knew of the claim of the McGoldrick Lumber Company, to the lands in controversy, (Trans. page 240). This testimony is surprising when we consider that the appellee, Milwaukee Lumber Company, had been charged with fraud and conspiracy in this transaction, and the appellee, Milwaukee Lumber Company, in its answer had denied the charge and had alleged that the officers of the Company, including Mr. Braderick, had no knowledge whatever of the claim of the McGoldrick Lumber Company, or any other person.

We call particular attention to the testimony of Mr. Cullen, at page 240 of the transcript:

“The conversation was I simply inquired generally of Mr. Braderick whether he knew of the claim of the McGoldrick Lumber Company to this property. He stated that he did, that he had examined into it before the purchase was made and had caused an examination to be made of the records, something like that.”

On cross examination on page 241, this witness says:

“I think I said I had some conversation with Herrick; my recollection as to that is somewhat uncertain because it was a general conversation with Mr. Herrick.”

We now call attention to the testimony of the clerk



of the court, A. L. Richardson, found at page 257 of the record:

"I am the clerk of this court. I keep a record of subpoenas issued in civil cases. Subpoenas were issued on Mr. Herrick and Mr. Norris on November 7th. Subpoena issued on Mr. Braderick on December 1st."

(This was after the day the case was set for trial, but the cause was not taken up by the court until later on the 2nd of December).

We now call attention of the court to the testimony of the Deputy United States Marshal, William Schuldt, found at page 257 of the record:

"I am Deputy United States Marshal. I received a subpoena for A. V. Braderick in this case yesterday morning. I telephoned St. Maries to locate him, and made inquiries of Mr. Herrick here. I reported my failure to get Mr. Braderick to Mr. McCarthy, who handed me the subpoena, Mr. McCarthy of Mr. Gray's office. The date of the subpoena for Mr. Braderick is December 1st. I received a subpoena for Mr. Norris and Mr. Herrick; that has been returned. . . . . I served Mr. Norris and Mr. Herrick on the 21st of November, 1913."

It is somewhat surprising to us that counsel for the complainant should have undertaken to have talked with Mr. Braderick, whom he knew was present in Coeur d'Alene at the time of the alleged conversation for the purpose of giving his testimony in this case, and it is more so, that the counsel as a witness should undertake to impress upon the court that Mr. Braderick had made admissions to him, knowing him to be an attorney for the complainant, so directly in con-

flict with the allegations of the answer of the appellee, Milwaukee Lumber Company, as exhibited in paragraph XXIX of the answer, (Trans. page 189), and we ask the court to note further that the conversation with Mr. Braderick was a **general conversation**, and that is the reason that he remembered it. The witness thinks that he had a conversation with Mr. Herrick, but his recollection as to that conversation is not good, because it was a **general conversation**.

Turning to the record of the testimony of the clerk and deputy marshal, who had to do with the subpoenas issued and served in this case, we find that the subpoena issued for Mr. Herrick and Mr. Norris was dated on November 7, and was served on November 21, and the witness, Mr. Cullen, had an uncertain recollection as to having talked with Mr. Herrick about the matter, and the subpoena for Mr. Braderick was not called for or issued until the day before the case was tried, and after the case had been set for trial. We are impressed with the thought that the conversation with Mr. Braderick was fixed at this time as a certainty, because Mr. Braderick was not present at the trial, and the appellees were unable to reach him to contradict the testimony of Mr. Cullen.

All issues of law involved herein having been so frequently before this court, and having been so thoroughly discussed by this court, upon appeals in other cases, we will not make any argument on the law or undertake to discuss any of the cases cited.

We, therefore, most respectfully submit that the lower court did not err in sustaining the demurrer of the defendants, Kinsolving and the Milwaukee Lumber Company, to complainant's bill of complaint, for the reasons that,

First: The complainant had a fair trial before the Land Department of the Department of the Interior upon the merits of its case upon issues of both law and fact, and that the judgment of the Department, is binding upon the trial court and upon this court.

Second: That the bill of complaint shows no misapplication of law to the facts found by the officers of the Land Department.

Third: That the only issue of law raised by the complainant in its bill of complaint is that the evidence before the officers of the Land Department in the Kinsolving contest or protest is insufficient to support the findings of fact made by the officers of the Land Department, to-wit: "That the application of the entryman, John Shannon, was made for speculative purposes," and that this court has no jurisdiction to review a decision of the United States Land Department on the ground that the evidence was insufficient or that only incompetent evidence was before it as the power of the Department to try questions of fact embraces the power to pass upon the weight of, the competency of, and the sufficiency of evidence.

If the demurrer is not sustained, then we respectfully submit that the testimony shows conclusively,

First: That the entryman Shannon made application to purchase this land in violation of the provisions of the act of June 3, 1878, by reason of the fact,

(a) He had, on the 24th day of September, 1906, two days before he made his application to purchase, entered into a written agreement to convey to McCarter, a one-half interest in the lands to which he was about to acquire title from the United States.

(b) After failing in his proof upon his commuted homestead entry, on the 25th day of September, 1906, on the advice of Roy C. Lammers, the agent of the complainant, and Joseph H. Johnson, his proposed grantee, he, Shannon, made his application to purchase and that prior to such application Johnson promised to furnish him the money therefor and to pay the United States for the land, and that in consideration of this promise Shannon agreed to give him, Johnson, an interest in the land, and consummated this agreement by conveying the land to Johnson on the 16th day of January, 1907, shortly after making proof.

Second: That by the written agreement between Shannon and McCarter, Shannon forfeited all rights to this particular tract of land.

Third: That under no rule of law is the complainant an innocent purchaser.

Fourth: That under the law and evidence adduced, the defendant, Milwaukee Lumber Company, is an



innocent purchaser or a purchaser without notice of any claim of the complainant.

Respectfully submitted,

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FRANK L. MOORE,  
R. B. NORRIS,

**Attorneys for Appellees, Kinsolving  
and the Milwaukee Lumber Company.**

EX

1.















